# 92-1465

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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**PAUL CASPARI**, Superintendent,
Missouri Eastern Correctional Center,
and
**JEREMIAH W. (JAY) NIXON**,
Attorney General of Missouri,

Petitioners,

vs.

**TERRY D. MCINTYRE**,

Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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WHETHER THE RULE OF GRADY V. CORBIN, 495 U.S. 508 (1990), CAN BE APPLIED RETROACTIVELY TO A HABEAS CORPUS PETITIONER BECAUSE THE DOUBLE JEOPARDY CLAUSE'S BAR TO A SUCCESSIVE PROSECUTION IS A CATEGORICAL GUARANTEE OF THE CONSTITUTION.

II.

WHETHER THE DOUBLE JEOPARDY CLAUSE, AS INTERPRETED IN GRADY V. CORBIN, 495 U.S. 508 (1990), (1) PROHIBITS THE INTRODUCTION AT TRIAL OF "EVIDENCE OF OTHER CRIME" WHERE THAT CRIME HAS ALREADY BEEN PROSECUTED OR (2) PROHIBITS THE PROSECUTION OF A CRIME WHERE EVIDENCE OF THAT CRIME WAS ADDUCED AT AN EARLIER TRIAL AS "EVIDENCE OF OTHER CRIME."

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PETITION FOR WRIT OF CERTIORARI
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## OPINIONS BELOW

The panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 975 F.2d 437 (8th Cir. 1992) and is published in the Appendix at A-1. The Order of this Court remanding the cause to the Court of Appeals is published at 112 S.Ct. 1658

(1992). The previous panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 938 F.2d 899 (8th Cir. 1991) and is published in the Appendix at A-29. The order sustaining and adopting the magistrate's report and recommendation is not reported, but is included in the Appendix (A-101). The magistrate's report and recommendation is not published, but is included in the Appendix (A-80). The earlier orders of the district court and the magistrate are also unpublished, but are included in the Appendix (A-65, 72).

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on September 4, 1992 (A-1). The petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on December 10, 1992 (A-126). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.1 and 13.4, the present petition for writ of certiorari was required to be filed by petitioners[1] within ninety days.

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[1]Petitioner Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, is the successor in office to Myrna Trickey, former Superintendent of the Missouri Eastern Correctional Center, and is respondent's current custodian. Under 28 U.S.C. § 2254, Rule 2(a), and Supreme Court Rule 35.03, Paul Caspari is a proper petitioner before this Court. Since the sentence respondent challenged was a sentence to be served in the future, Missouri Attorney General Jeremiah W. (Jay) Nixon is also a proper petitioner before this Court. 28 U.S.C. § 2254, Rule 2(b); Supreme Court Rule 14.1(b).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Respondent was found guilty by a jury of stealing a motor vehicle and was sentenced by the Court as a persistent offender to a term of ten years' imprisonment to be served consecutively to an existing ten-year sentence (A-30-31). Section 570.030.3(3)(a), RSMo 1986. The conviction and sentence for stealing were imposed by the Circuit Court of St. Louis County, Missouri.

The circumstances surrounding respondent's crime were summarized by the Missouri Court of Appeals on direct appeal.

> On November 22, 1985, a man who identified himself as "Johnny" went into Kirkwood Mitsubishi and told salesman Steven George he wanted to test-drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the

keys to the demonstrator Galant.

After a test-drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About fifteen minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys from the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis City police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photographs, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George and asked him if any of the photos were of the person who was in the

dealership and took a drive in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first-degree tampering for operating the Galant in the City of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to ten years' imprisonment. [The Missouri Court of Appeals] affirmed his tampering conviction on appeal. **State v. McIntyre**, 735 S.W.2d 111 (Mo.App. 1987) [A-108].

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also identified defendant in court as "Johnny," the person who test-drove the Galant that later was stolen. Defendant

> also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the day of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

**State v. McIntyre**, 749 S.W.2d 420, 421 (Mo.App., E.D. 1988) (A-115-119). After respondent's conviction and sentence, respondent appealed to the Missouri Court of Appeals. Id. He raised a double jeopardy claim before that court based on **Brown v. Ohio**, 432 U.S. 161 (1977); however, the Missouri Court of Appeals affirmed the conviction and sentence (A-119-122). Respondent pursued no state post-conviction remedies.

On September 2, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (A-127).

After litigation before the district court, Magistrate David Noce filed his report and recommendation that the petition be denied (A-65). District Judge Edward L. Filippine adopted the recommendation (A-72).

On November 30, 1988, respondent filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) (A-137). The district court ordered petitioners to respond to the pleading (A-74). After further litigation, the magistrate again recommended that the petition be denied (A-80). The district court adopted the magistrate's report and recommendation (A-101). The district court denied respondent's request for a certificate of probable cause to appeal (A-103); however, the certificate was granted by the court of appeals (A-106).

On appeal before the court of appeals, petitioners asserted, inter alia, that review of the double jeopardy claim was barred under the retroactivity rules of **Teague v. Lane**, 489 U.S. 288 (1989). The court of appeals agreed that **Grady v. Corbin**, 495 U.S. 508 (1990), was a "new rule" under **Teague**, but that it fit within the first recognized exception to the **Teague** retroactivity doctrine (A-41-52). Citing **United States v. Felix**, 926 F.2d 1522 (10th Cir. 1991), rev'd, 112 S.Ct. 1377 (1992), the court of appeals determined that respondent's double jeopardy claim warranted relief (A-52-63). Petitioners' petition for rehearing or rehearing en banc was denied. This Court, however, granted the petitioners' petition for writ of certiorari and remanded the cause to the court of appeals. **Caspari v. McIntyre**, 112 S.Ct. 1658 (1992).

On remand, the court of appeals adhered to its original conclusion. Recognizing a divergence between its analysis and that of the Court of Appeals for the Second Circuit, the Court of Appeals for the Eighth continued to adhere to its belief that double jeopardy claims fall within the first exception of the **Teague** retroactivity doctrine (A-7 & n.2). The lower court also found that this case was not governed by this Court's opinion in **United States v. Felix** (A-7-27). Accordingly, the Court adhered to its decision to grant the writ of habeas corpus (A-2). Rehearing was denied. Rehearing *en banc* was also denied, but Circuit Judges Fagg and Beam voted to rehear the case *en banc* (A-126). The present petition for writ of certiorari ensues.

## ARGUMENT

I.

Whether the rule of Grady v. Corbin, 495 U.S. 508 (1990), can be applied retroactively to a habeas corpus petitioner because the Double Jeopardy Clause's bar to a successive prosecution is a categorical guarantee of the Constitution.

To justify a grant of certiorari, petitioners must show a conflict between the lower-court opinion and opinions from other circuits or this Court. Alternatively, petitioners must show an important question of federal law which has not been, but should be settled by this Court. Supreme Court Rules 10.1(a), (c). The present case represents an opportunity for this Court to discuss the first exception to the **Teague** retroactivity rule. **Teague v. Lane**, 489 U.S. 288, 307 (1989) (new rule applying retroactively if it places certain kinds of primary,

private conduct beyond the power of government to proscribe). The present case also represents an opportunity to resolve the divergent opinions between the Courts of Appeals for the Second, Fifth and Eighth Circuits. Accordingly, the writ of certiorari should issue.

The Court of Appeals reconsidered the retroactivity issue in its September 4, 1992 opinion (App. 7). The court adhered to its analysis from its earlier opinion (App. 7, 41-52).

Petitioners and the lower court agree that respondent's request that the court apply the double jeopardy principles of Grady v. Corbin, 495 U.S. 508 (1990), was a request that the Court apply "new law" retroactively (A-42-44). The Grady rule was not "dictated" by a prior precedent when respondent's direct appeal became final in 1988; therefore, it was a "new rule" under Teague. See

Johnson v. Howard, 963 F.2d 342, 344 (11th Cir. 1992).

Petitioners and the lower court agreed that the second exception to Teague is inapplicable. The Double Jeopardy Clause concepts of Grady do not require the observance of procedures that are implicit in the concept of ordered liberty (A-45, quoting Teague v. Lane, 489 U.S. 288 (1989)). See Johnson v. Howard, 963 F.2d at 345.

Petitioners and the lower court diverge on the issue of whether the first exception to the Teague retroactivity doctrine is applicable. In Teague, this Court described that exception.

> [A] new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

Teague v. Lane, 489 U.S. at 307, quoting Mackey v. United States, 401 U.S. 667,

692 (1971) (separate opinion of Harlan, J.).

There are three courts of appeals that have discussed this exception as it relates to double jeopardy claims brought forth by habeas corpus petitioners. The court below found applicable the first exception to the **Teague** doctrine. Citing **Penry v. Lynaugh**, 492 U.S. 302 (1989), the Court of Appeals for the Eighth Circuit found the Double Jeopardy Clause's prohibition against successive prosecution to be a categorical guarantee of the Constitution. (A-46-52). In **Johnson v. Howard**, 963 F.2d at 342, the Fifth Circuit agrees with the analysis of the Eighth Circuit in **McIntyre**.

On the other hand, the United States Court of Appeals for the Second Circuit, in **United States v. Salerno**, 964 F.2d 172 (2d Cir. 1992), expressly disagrees with the lower court's **McIntyre** opinion.

> As we have observed, **McIntyre** has been vacated and remanded by the Supreme Court for reconsideration in light of **Felix**. See, supra n.2. In any event, we disagree with the Eighth Circuit's analysis of [retroactivity].

Id. at 178. The **Salerno** court declined to apply **Grady** retroactively. Petitioners amply demonstrate a split of opinion by the three lower courts concerning the application of the first **Teague** exception.

The significance of this issue for the states in the Fifth and Eighth Circuits is perhaps manifested by the large number of criminal prosecutions, state and federal, that have arisen in these circuits. The significance is also clear for the states within the Eighth Circuit given that circuit court's propensity with habeas corpus cases to read expansively exceptions to this Court's rules prohibiting federal habeas corpus review.

See, e.g., **Sawyer v. Whitley**, 112 S.Ct. 2514, 2521 n.11 (1992) (rejecting Eighth Circuit's test for "probable actual innocence" exception to procedural default doctrine); **Simmons v. Lockhart**, 915 F.2d 372, 376 (8th Cir. 1990) (ineffective assistance of post-conviction counsel constituting cause). Petitioners believe that it is necessary for this Court to review and discuss its construction of the first exception to **Teague** rather than allow the Fifth and Eighth Circuits to infect themselves and perhaps other federal courts with an improper interpretation of that exception.

In **Teague**, the Court articulated the first exception to the retroactivity doctrine. Under that exception, a habeas applicant may rely on a "new rule" of law "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making

authority to proscribe.'" **Teague v. Lane**, 490 U.S. at 311. Of course, the **Teague** opinion quotes Justice Harlan's concurrence in **Mackey v. United States**, 401 U.S. at 692.

In **Mackey**, Justice Harlan identified several examples of this exception. Id. at 692 n.7. These examples include rules that preclude prosecution of (1) expressive conduct protected by the first amendment, **Street v. New York**, 394 U.S. 576 (1969); (2) silence protected by the fifth amendment, **Grosso v. United States**, 390 U.S. 62 (1968); (3) certain protected intimate behavior, **Loving v. Virginia**, 388 U.S. 1 (1967); **Griswold v. Connecticut**, 381 U.S. 479 (1965); and (4) conduct in the constitutionally protected privacy of one's home, **Stanley v. Georgia**, 394 U.S. 557 (1969).

Since the double jeopardy rule of **Grady** does not involve the

decriminalization of the offense of felony stealing, the first exception from **Teague** is simply inapplicable. The court of appeals appears to concede as much from its failure to discuss this **Teague** exception (A-46-52). Rather, the court of appeals almost immediately begins its discussion of **Penry v. Lynaugh**, 492 U.S. at 302.

A different aspect of the first **Teague** exception was discussed by this Court in **Penry**. In **Penry**, the Supreme Court extended the **Teague** doctrine to capital-sentence collateral proceedings. Accordingly, it was appropriate that the first **Teague** exception expand to the context of capital sentencing. Cf. **Sawyer v. Whitley**, 112 S.Ct. at 2514 (discussing "probable actual innocence" exception in capital-punishment habeas context).

The court of appeals accurately quotes the language from the **Penry** opinion (A-46). The court of appeals then goes on to quote language from **Butler v. McKellar**, 494 U.S. 407 (1990), for the proposition that the "first **Teague** exception [encompasses] '"categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders'" [sic]" (A-47-48, quoting **Butler v. McKellar**, 494 U.S. at 415). The court of appeals interprets the "such as" language as giving it a commission to create new exceptions to the **Teague** retroactivity rule.

Petitioners, however, believe it is clear that the "such as" language from this Court referred directly to the language from this Court that followed the "such as" language--that being "a prohibition on the imposition of a particular

punishment on a certain class of offenders." Petitioners also believe that this "such as" language refers to the "categorical guarantees accorded by the Constitution" that were discussed in the first aspect of the first **Teague** exception--the guarantees discussed by the Court in **Teague** and by Justice Harlan in **Mackey**.

This interpretation is logical since **Penry** extended **Teague** to the capital-sentencing situation. The first exception had to be modified slightly in order for it to make sense in a sentencing context. Of course, respondent's request for the application of the "new law" in **Grady v. Corbin** is unsupported by the plain words of **Teague**, **Penry** or **Butler**. The court of appeals provides no explanation for reading the language as something other than what this Court says it means.

This criticism is even more telling in light of the express language from this Court in **Saffle v. Parks**, 494 U.S. 484 (1990). In **Saffle**, the Supreme Court was quite clear as to the scope of the first exception to the **Teague** retroactivity rules:

> The rule sought by Parks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons.

Id. at 495; see **Smith v. Black**, 904 F.2d 950, 986 (5th Cir. 1990), vac'd on other grounds, 112 S.Ct. 1463 (1992); **Wickham v. Dowd**, 914 F.2d 1111, 1115-16 (8th Cir. 1990), cert. denied, 111 S.Ct. 2897 (1991). Indeed, in **Wickham** the Court examined the new rule and determined that it did not protect the habeas petitioner due to his status or due to the nature of the offense. Id. Likewise, the **Grady** "new rule" does not prohibit punishment

for reasons of respondent's status or the nature of his offense.

If one were to assume that the previous analysis is incorrect and that this Court wishes the first **Teague** exception to apply to requests for "new law" that this Court has not yet listed, then petitioner suggests that the Double Jeopardy Clause protection discussed in **North Carolina v. Pearce**, 395 U.S. 711, 717 (1969), are not "categorical guarantees accorded by the Constitution" within the meaning of **Butler v. McKellar**. Those **Pearce** guarantees are the prohibition against the second prosecution for the same offense after acquittal, the protection against a second prosecution for the same offense after conviction, and the protection against multiple punishments for the same offense. Id. At least in the context of the successive-trial protections, the Double Jeopardy Clause's

protections are procedural in nature and are designed to ensure that the government litigates a criminal prosecution fully in the first trial.

The court of appeals discusses extensively the protection against multiple punishment with its **Teague** analysis (A-48-50). The rule in **Grady**, however, does not implicate the multiple-punishment protection of the Double Jeopardy Clause. See **United States v. Chippas**, 942 F.2d 498, 500 (8th Cir. 1991), quoting **United States v. Oritz-Alarcon**, 917 F.2d 651, 654 (1st Cir. 1990), cert. denied, 111 S.Ct. 2035 (1991). The rule in **Grady** implicates only the protections from successive trials, a procedural protection. Id. The court of appeals' language concerning multiple punishment is absolutely beside the point. Whether the first exception to the **Teague** retroactivity rule is implicated by the

multiple-punishment protection is an issue best left for a multiple-punishment-protection/double jeopardy case, not a successive-prosecution case.

> It seems to us that **Penry** effects a rather carefully limited expansion of the first "primary conduct" exception, and that **McIntyre** inappropriately puts **Grady** into the **Penry** category. The rules established in **Grady** does not immunize primary conduct from overall, or any specific, criminal punishment. Manifestly, the offenses for which Persico and Langella were convicted remain illegal after **Grady**. **Grady** would establish, at most, that their admittedly criminal conduct cannot be prosecuted in separate trials. This, we believe, is a procedural matter properly tested under the second, rather than first, exception to the prohibition against retroactive application of new rules.

**United States v. Salerno**, 964 F.2d at 178. The multiple-punishment protection is different than the multiple-prosecution protection. **North Carolina v. Pearce**, 395 U.S. at 717.

The court of appeals also refers the reader to some pre-**Teague** cases concerning the retroactive application of Double Jeopardy Clause decisions (A-50-52, citing **Robinson v. Neil**, 409 U.S. 505 (1973)). After **Robinson**, however, there has been a radical change in this Court's view of the Double Jeopardy Clause. This Court no longer believes that a double jeopardy claim deprives the trial court of "jurisdiction." Indeed, double jeopardy rights are now perceived as personal rights that a defendant may waive. See **United States v. Broce**, 488 U.S. 563 (1989) (waiver of rights by guilty plea). Given this change in attitude by this Court, the court of appeals' reference to **Robinson** and its underlying rationale is ill-founded.

In **United States v. Broce**, the Court declared that a defendant who has entered a plea of guilty to a criminal charge may

not assert a double jeopardy claim in a collateral attack upon the sentence. Id. at 570-72. Defendant Broce waived his right to challenge his conviction on double jeopardy grounds by entering the plea of guilty. Id. at 576; see **Taylor v. Whitley**, 933 F.2d 325, 328-29 (5th Cir. 1991), cert. denied, 112 S.Ct. 1678 (1992). Indeed, the lower court had held earlier that a valid plea of guilty waives a double jeopardy claim. **United States v. Connelly**, 503 F.2d 520 (8th Cir. 1974); **Harris v. United States**, 237 F.2d 274 (8th Cir. 1956). Respondent's "new rule" hardly constitutes a "categorical guarantee accorded by the Constitution." No aspect to the first exception to the **Teague** retroactivity doctrine is applicable.

Missouri and the other states located in the Eighth Circuit, as well as those located in the Fifth Circuit, are

faced with courts that wish to extend "categorical guarantees accorded by the Constitution" beyond the two situations discussed by this Court in **Teague** and **Penry**. Where will it stop? Missouri suspects that a variety of common constitutional claims may eventually become "categorical guarantees" within the Eighth Circuit unless this Court grants review. That the Fifth Circuit has adopted and other courts of appeals may adopt such an elastic reading of this Court's language is possible, if not probable. This Court's grant of a writ of certiorari will allow this Court to speak authoritatively upon this issue.

II.

Whether the Double Jeopardy Clause, as interpreted in **Grady v. Corbin**, 495 U.S. 508 (1990), (1) prohibits the introduction at trial of "evidence of other crime" where that crime has already been prosecuted or (2) prohibits the prosecution of a crime where evidence of that crime was adduced at an earlier trial as "evidence of other crime."

The court of appeals' September 4, 1992 opinion was issued after this Court had remanded the cause to the court of appeals for further consideration in light of **United States v. Felix**, 112 S.Ct. 1377 (1992). **Caspari v. McIntyre**, 112 S.Ct. 1658 (1992). The United States Court of Appeals for the Eighth Circuit again found that respondent's constitutional rights under the Double Jeopardy Clause were violated by his prosecution in the St. Louis County Circuit Court for

theft after he had been prosecuted in the St. Louis City Circuit Court for the offense of tampering (A-2). Under the circumstances of this case, respondent is unable to demonstrate a violation of his rights under the Double Jeopardy Clause.

In June, 1986, a jury in the Circuit Court of the City of St. Louis found respondent guilty of first-degree tampering under § 569.080, RSMo 1986, based on respondent's operation on November 24, 1985, of an automobile knowing that he acted without the owner's consent. In February, 1987, a jury in the Circuit Court of St. Louis County found respondent guilty of felony stealing under § 570.030, RSMo 1986, based on his stealing an automobile from a car dealership on November 22, 1985 (A-3). The issue is whether the Double Jeopardy Clause prohibited the second trial, the St. Louis County trial, for stealing. The answer

is clearly no, and the court of appeals' determination to the contrary creates a significant issue adversely affecting the prosecution of crime by the states and federal government within the Eighth Circuit.

Congress authorizes federal district courts to admit evidence of other crimes for limited purposes such as for proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake of accident. Federal Rule of Evidence 404(b). Under Missouri state law, such evidence is inadmissible unless it tends to establish motive, intent, absence of mistake or accident, common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, or identity. See **State v. Kenley**, 693 S.W.2d 79, 81 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986). The lower

court's opinion effectively prohibits a prosecutor from presenting evidence of other crimes for the jury to consider when the other crimes have been or will be the subject matter of a prosecution. This presents a significant question for this Court's discretionary review. Supreme Court Rule 10.1.

Distilled to its essence, the fact pattern in this case is simple. There are two separate and distinct crimes under Missouri law, *compare* § 569.080, RSMo 1986 (first-degree tampering), *with* § 570.030, RSMo 1986 (stealing), committed on two different days, November 22, 1985 (stealing), and November 24, 1985 (tampering), in two different jurisdictions, St. Louis County (stealing) and the City of St. Louis (tampering).

At respondent's first trial, respondent was convicted of the second crime, first-degree tampering. At this trial,

evidence about the first crime (stealing) was introduced as evidence of other crimes concerning respondent's state of mind. The ruling of the state trial court to admit this evidence was affirmed on direct appeal of the first trial.

> As an element of its case, the state was required to prove defendant knew he was operating the car without the consent of the owner. The evidence linking defendant with theft of the car tended to establish this knowledge on the part of defendant and thus was relevant. See, e.g., **State v. Remspecher**, 542 S.W.2d 24, 25 (Mo.App. 1976). The key question is whether the relevance of this question is outweighed by its possible prejudicial effect. **Caldwell**, supra at 494. The decision whether the potentially prejudicial effect of evidence outweighs its probative value is within the sound discretion of the trial court. **Shaw**, supra at 672. The trial court here properly exercised its discretion in admitting the evidence.

**State v. McIntyre**, 735 S.W.2d 111, 112 (Mo.App., E.D. 1987) (A-111). As should be clear, at the first trial petitioner

was prosecuted for the second crime, with evidence of the first crime being admitted as "evidence of other crimes," to help to demonstrate respondent's knowledge that he was operating the car without the consent of the owner.

Several months later, at respondent's second trial, he was prosecuted for the first crime, the offense of stealing. The trial court also admitted information about respondent's November 24th operation of a motor vehicle without the owner's consent. That information was admitted as evidence of other crimes to show respondent's purpose on November 22nd of withholding the vehicle permanently from the owner. Respondent did not even complain about the admission of evidence of other crimes during his direct appeal of the second trial. **State v. McIntyre**, 749 S.W.2d 420 (Mo.App., E.D. 1988) (A-115).

How did the lower court treat the "evidence of other crimes" issue? The court of appeals noted that its previous opinion, **McIntyre v. Trickey**, 938 F.2d 899 (8th Cir. 1991), was reversed and remanded for reconsideration in light of **United States v. Felix**, 112 S.Ct. 1377 (1992). **Caspari v. McIntyre**, 112 S.Ct. 1658 (1992). An examination of the **Felix** opinion indicates that it contains two substantive issues.

Part II of the **Felix** opinion discusses whether the government was foreclosed from prosecuting criminal charges because it had presented evidence of the events underlying the charges at a prior trial in order to help demonstrate the defendant's criminal intent. Id. at 1382. Relying on **Dowling v. United States**, 493 U.S. 342 (1990), the Supreme Court found the latter convictions proper since the government had not previously

prosecuted the defendant for those acts. Id. at 1383. The mere introduction of evidence of other crimes does not constitute a prosecution for those other crimes. Id. at 1383.

Part III of the **Felix** opinion discusses whether the prosecution for substantive crimes precludes a later prosecution for conspiracy using those crimes, along with others, as the overt acts of the conspiracy. Id. at 1383-85.

The panel extensively discusses the issues contained in Part III of the **Felix** opinion (A-13-24). In petitioners' opinion, however, the most significant part of **Felix**, Part II, was treated as a two-paragraph afterthought by the court of appeals (A-24-26).

The court of appeals discussed Part II of the **Felix** opinion for two paragraphs out of a multiple-page opinion. In the first paragraph of discussion,

paragraph two on page A-24, the court summarizes in four sentences Part II of the **Felix** opinion.

As its second paragraph of analysis, the court repeats its analysis from its 1991 opinion without application of **Felix** to the case (A-25, citing **McIntyre v. Trickey**, 938 F.2d at 906)). This hardly seems to be what this Court had in mind when it remanded the cause to the court of appeals for reconsideration of the 1991 opinion in light of **Felix**.

"The government, to establish essential elements of the stealing crime, proved conduct--operating an automobile without the owner's consent--for which McIntyre had already been prosecuted (A-25). Other than its citation to the previously vacated opinion, the court offers no authority for this sentence. Such is understandable since it is simply wrong.

At the second trial (stealing), evidence about the November 24 tampering was admitted as evidence of other crimes. Whether the government "proved conduct" is unknown since the jury was not required to find beyond a reasonable doubt--at the second trial--that respondent's November 24th conduct constituted first-degree tampering. At the second trial, the government had no burden of proving tampering conduct--certainly not beyond a reasonable doubt. The jury could have inferred respondent's mental state, that respondent took the car for the purpose of withholding it permanently from the owner, without evidence of the November 24th tampering conduct.

The State introduced evidence about the November 24 tampering, but there was no second prosecution for tampering.

> At the Missouri trial, the Government did not in any way prosecute Felix for the

> Oklahoma methamphetamine transaction; it simply introduced those transactions as prior acts evidence under Rule 404(b). The Government was therefore free to prosecute Felix in the trial below for the substantive drug crimes . . . .

**United States v. Felix**, 112 S.Ct. at 1383.

If Missouri's United States Attorney did not prosecute Felix for the Oklahoma crime when it introduced that evidence of other crimes, then the same should be true when a state prosecutor introduces evidence of other crimes even though there has already been a conviction. The **Felix** court noted that evidence of Missouri crimes--crimes for which Felix had already been prosecuted--was introduced at the Oklahoma prosecution. Id. at 1381. Neither the Court of Appeals for the Tenth Circuit nor the Supreme Court found a double jeopardy violation from this. **Felix** makes it clear that the

introduction of evidence of other crimes is not a prosecution; thus, at the second trial, the admission of evidence about tampering should not constitute a second prosecution for double jeopardy purposes.

The panel stated:

> Unlike **Felix**, the government here did not introduce conduct pertaining to a separate crime at the first trial simply to help prove an element of the crime charged; rather, the conduct the government proved constituted the entirety of the crime prosecuted at the first trial. Moreover, the same conduct was proved to establish nearly the entirety of the offense charged in the second prosecution.

[A-25-26.] This is exactly what is approved by this Court in **Dowling** and **Felix**. These cases allow the government to prosecute for Crime X with the admission of evidence concerning Other Crime Y. These cases then allow the government to prosecute for Crime Y with the admission of evidence concerning Other Crime

X. At this second trial, the government's case may constitute "the entirety of the crime prosecuted at the first trial" (A-26), and that is certainly authorized by the Supreme Court. Petitioners suspect that Mr. Felix's sense of deja vu was triggered when the Oklahoma federal trial court admitted evidence of crimes that had already been admitted as "bad acts evidence" at his earlier Missouri trial.

A hypothetical that is not a hypothetical illustrates the error with the court of appeals' opinion. Mr. Kenley went on a crime spree on January 3rd and 4th of 1984. See **Kenley v. Armontrout**, 937 F.2d 1298 (8th Cir.), cert. denied, 112 S.Ct. 431 (1991). In the midst of this crime spree, Mr. Kenley committed the capital murder of Ronald Felts, for which he was convicted and sentenced. **State v. Kenley**, 693 S.W.2d at 79. The

Missouri Supreme Court upheld the use at the murder trial of evidence of other crimes from that crime spree. The court found the evidence to be particularly probative of Mr. Kenley's mental state of deliberation and premeditation. Id. at 81-82. At the later trial for the multiple other crimes, the trial court admitted evidence of the murder, and the state court found this to be proper evidence of other crimes. **State v. Kenley**, 701 S.W.2d 185, 186 (Mo.App., S.D. 1985).

Under the court of appeals' opinion, the jury deliberating the other crimes charged would be denied access to the evidence of murder even though the State had no obligation to present the evidence of murder, had no obligation to prove the murder beyond a reasonable doubt, and the jury would receive no instructions about finding a murder. Of course, under

**Dowling** and **Felix**, there is no Double Jeopardy Clause violation.

Mr. Kenley received two trials due to § 565.004.1, RSMo 1986 (requiring severance of other crimes where state is seeking capital punishment for first-degree murder). Likewise, a state trial judge may order a severance of offenses for trial under Missouri Supreme Court Rule 24.07. That severance, however, under the court of appeals' opinion, may unfairly limit the State's proof of other crimes at the first trial since those crimes could not be prosecuted at a second trial.

A similar situation can occur when a defendant commits crimes in more than one county. Generally speaking, under Missouri procedure, venue is proper where the offense is committed or, if the offense is committed in more than one county, the venue is proper in any county

where an element of the offense occurred. See § 541.033, RSMo 1986. These statutes and rules, combined with the court of appeals' opinion, raises a variety of hypotheticals: What if a defendant commits a burglary in Kansas City, but when arrested, he possesses the stolen property in St. Joseph? The possession evidence would be significant at a burglary trial, and the burglary evidence would be significant at a possession trial. Under the court of appeals' opinion, the prosecutor cannot use the other-crimes evidence at whichever happens to be the first trial.

Should it matter if the arrest for retention occurred two hours after the burglary, two days after the burglary, two weeks after the burglary or two years after the burglary? The answer is no.

Even under an expansive reading of **Grady**, the Double Jeopardy Clause only

prohibits a second trial where one act or conduct gives rise to separate offenses. Under **Grady**, the separate offenses from one conduct may not be prosecuted consecutively. Additionally, under **Dowling** and **Felix**, when offenses arise on different days and from different conduct, the prosecutions can occur consecutively. In **Felix**, the court noted that the actual crimes were different in both time and place. **United States v. Felix**, 112 S.Ct. at 1382. The same is true in **McIntyre**: stealing on November 22nd in St. Louis County and tampering on November 24th in St. Louis City. Put another way, there is no common conduct that gives rise to the separate offenses.

Another hypothetical illustrates: Let us assume that the defendant commits first-degree murder in the City of St. Louis and he is later arrested while carrying the concealed weapon about his

person. It does not matter where this hypothetical defendant is arrested since, in Missouri, the carrying a concealed weapon offense could not be tried jointly with the first-degree murder. See § 565.004.1, RSMo 1986. Assuming the carrying a concealed offense occurred in Kansas City, would it make any difference that the offense occurred four hours after the murder, four days after the murder, four months after the murder, or four years after the murder? The answer should be no.

Another hypothetical illustrates: Let us assume a federal defendant robs a federally insured bank in Joplin, Missouri, and then robs a federally insured bank in Beggs, Oklahoma. Under the court of appeals' decision, if the federal Oklahoma prosecution occurred first, with the admission of the Missouri evidence, then a federal Missouri prosecution with

the Oklahoma evidence is barred by the Double Jeopardy Clause. Of course, this hypothetical should sound familiar because it is little different than **Felix**.

Petitioners submit that this discussion amply demonstrates the need for this Court to grant the petition for writ of certiorari. This case gives the Court an opportunity to clarify the relationship of **Dowling**, **Grady** and **Felix**. Petitioners submit that a grant of certiorari in this cause is necessary to effectuate Congress's intent with Federal Rule of Evidence 404(b) and the states' attempts at defining their laws concerning evidence of other crimes. This significant issue requires this Court's resolution.

## CONCLUSION

Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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No. 92-_____

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In the
Supreme Court of the United States
October Term, 1992

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,
and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

*Petitioners,*

vs.

TERRY D. McINTYRE,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume I)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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|---|---|---|
| **PAUL CASPARI, Superintendent, Missouri Eastern Correctional Center, and JEREMIAH W. NIXON, Attorney General of Missouri,** | ) | |
| **Petitioners,** | ) | |
| **vs.** | ) | No. 92-_____ |
| **TERRY D. McINTYRE,** | ) | |
| **Respondent.** | ) | |

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**UNITED STATES COURT OF APPEALS**
FOR THE EIGHTH CIRCUIT

No. 89-2700

| | | |
|---|---|---|
| Terry D. McIntyre, | ) | |
| | ) | |
| Appellant, | ) | Remand from the |
| | ) | United States |
| v. | ) | Supreme Court. |
| | ) | |
| Myrna Trickey, | ) | |
| | ) | |
| Appellee. | ) | |

Submitted: May 27, 1992

Filed: September 4, 1992

Before MCMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

This case is before us on remand from the United States Supreme Court. In McIntyre v. Trickey, 938 F.2d 899 (8th Cir. 1991), we held that a state attorney's prosecution of Terry D. McIntyre for stealing an automobile violated the Fifth Amendment's Double Jeopardy Clause because McIntyre had earlier been

prosecuted for first-degree tampering based on his unauthorized operation of the same automobile. Id. at 905-07. Our decision applied the rule of Grady v. Corbin, 495 U.S. 508 (1990), which states that the Double Jeopardy Clause blocks a subsequent prosecution if the government, to establish an essential element of the charge to be prosecuted, will prove conduct constituting an offense for which the defendant has already been prosecuted. Id. at 521. In United States v. Felix, 112 S. Ct. 1377 (1992), the Supreme Court recently announced limitations on the Grady rule. The Court vacated our opinion in McIntyre, and remanded for reconsideration in light of Felix. Caspari v. McIntyre, 112 S. Ct. 1658 (1992). Relying on Grady, as modified by Felix, we again hold that the second prosecution of McIntyre violated the Double Jeopardy Clause.

In June 1986, a circuit court in the City of St. Louis found McIntyre guilty of first-degree tampering, based on his operation of an automobile owned by a Kirkwood, Missouri, car dealership with the knowledge that he lacked the owner's consent. In February 1987, a circuit court in the County of St. Louis convicted McIntyre of stealing that same automobile from the dealership.

The Missouri Court of Appeals rejected McIntyre's double jeopardy claim. State v. McIntyre, 749 S.W.2d 420, 422 (Mo. Ct. App. 1988). McIntyre filed a petition for a writ of habeas corpus in the district court based on his double jeopardy claim.[1] A magistrate judge

---

[1]Nothing appears in the record regarding McIntyre's efforts to exhaust his state remedies. The State of Missouri, in its response to McIntyre's

recommended denying McIntyre's petition because under Missouri law, tampering is not a lesser-included offense of stealing. McIntyre v. Trickey, No. 88-1708C(2), slip op. at 3-4 (E.D. Mo. Nov. 2, 1988) (magistrate's report). The district court adopted the magistrate's report and recommendation. Order of Nov. 22, 1988, slip op. at 1. After McIntyre refined and reasserted his claim in a motion to alter or amendment [sic] judgment, the magistrate again recommended denying relief, Magistrate's Report of August 8, 1989, slip op. at 12, and the district court adopted that recommendation. Order of September 18, 1989, slip op. at 1.

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(Footnote Continued)
federal habeas petition, stated that McIntyre had exhausted all state remedies on his double jeopardy claim and his petition was not procedurally barred. 938 F.2d at 900-01.

After proceedings in the district court, the Supreme Court issued its opinion in Grady v. Corbin, and McIntyre asserted a Grady claim before this court. This court rejected the State of Missouri's arguments that we should not reach the merits because McIntyre had failed to exhaust state remedies and had committed "abuse of the writ." McIntyre, 938 F.2d at 901-02. We also held that McIntyre was entitled to rely on Grady although that case prescribed a "new rule" under Teague v. Lane, 489 U.S. 288 (1989). McIntyre, 938 F.2d at 902-04. We concluded that the Grady rule fit into one of the two Teague exceptions that allow retroactive application of new rules for cases on collateral review. Id.

We concluded under Grady that the second prosecution of McIntyre violated the Double Jeopardy Clause because "the

government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted." Id. at 906. We observed that in the second trial, for stealing, the "government proved the same conduct that it had proved to establish the entirety of the tampering offense." Id. (emphasis added). We then observed that the conduct that proved the tampering offense was used to prove "the whole of . . . two elements" of the stealing charge. Id.

After the Supreme Court vacated our decision with directions to reconsider in light of Felix, the parties submitted letter briefs at our request.

The State of Missouri again argues that McIntyre should be prohibited from proceeding on the merits because he failed to exhaust his double jeopardy

claim in the state courts. The State also repeats its argument that McIntyre cannot rely on Grady because that case announced a "new rule" after his conviction became final.

We are not persuaded by the State's arguments and adhere to our earlier holdings on these issues.[2] See 938 F.2d at 901-04.

The State next contends that Felix requires denial of McIntyre's petition for a writ of habeas corpus.

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[2]We are aware of the Second Circuit's decision in United States v. Salerno, 964 F.2d 172 (2d Cir. 1992), disagreeing with our conclusion that the Grady rule is retroactively available to habeas petitioners because it falls within one of the two Teague exceptions. Id. at 176-79. We adhere to our holding that Grady must be accorded retroactive effect because the prohibition on double jeopardy is a "'categorical guarantee[] accorded by the Constitution.'" McIntyre, 938 F.2d at 904 (citation omitted).

Specifically, the State asserts that: (1) McIntyre was prosecuted at the first trial only for tampering and at the second trial only for stealing; (2) a mere overlap in proof between the two prosecutions does not establish a double jeopardy violation; and (3) the conduct constituting the two offenses, stealing and tampering, occurred on different days and the Double Jeopardy Clause thus does not bar separate prosecutions.

The resolution of this case turns on the extent to which Felix modifies the rule of Grady. The Grady test is relatively simple in its formulation: The Double Jeopardy Clause bars a "subsequent prosecution [if] . . . the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 495 U.S. at 521. In

Felix, however, the Supreme Court refused to apply this language to bar a prosecution for conspiracy to manufacture, possess, and distribute methamphetamine when two of the nine overt acts supporting the conspiracy charge were based on conduct for which Felix had previously been prosecuted. 112 S. Ct. at 1380, 1385. The Court also held that prosecution on related substantive counts was not barred even though evidence concerning the underlying conduct had been introduced in a previous drug trial to establish Felix's criminal intent. Id. at 1380, 1382-83.

In its discussion, the Court distinguished between prosecution for an offense and the introduction of relevant evidence of particular misconduct. Id. at 1383. It also distinguished between crimes involving a "'single course of conduct'" and those involving

"'multilayered conduct as to time and place.'" Id. at 1385.

Felix thus limited, but did not discard Grady. Our task is to determine whether the nature of McIntyre's criminal conduct and the scope of the two prosecutions still bring his case within the Grady rule or cast it into one of the categories covered by Felix.

In Grady, the Court held that the Double Jeopardy Clause barred the prosecution of a motorist for criminally negligent homicide and assault after he had earlier pled guilty to driving while intoxicated and failing to keep to the right of the median in connection with the same accident. 495 U.S. at 521-23. The Court observed that the State of New York admitted that it planned to prove "the entirety of the conduct for which Corbin was convicted--driving while intoxicated and failing to keep right of

the median--to establish essential elements of the homicide and assault offenses." Id. at 523. The Court stated, however, that the State could proceed with the prosecution if it relied on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. It also limited its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from introducing that same evidence in a subsequent proceeding." Id. at 521-22. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id. at 521.

Felix presented a far different factual pattern than that of Grady. The government first prosecuted Felix in the Western District of Missouri for the attempt to manufacture methamphetamine

between August 26 and 31, 1987, based on the delivery of precursor chemicals and equipment to him at Joplin, Missouri. 112 S. Ct. at 1379. To counter Felix's defense that he lacked criminal intent with respect to the delivery, the government introduced evidence that he had manufactured methamphetamine in Oklahoma earlier in 1987. Id. at 1380. The government introduced the evidence under Federal Rule of Evidence 404(b), and the district court instructed the jury that the evidence of the Oklahoma activities was admissible only to show Felix's state of mind regarding the chemicals and equipment he attempted to purchase in Missouri. Id.

The government later prosecuted Felix in the Eastern District of Oklahoma for conspiracy to manufacture, possess, and distribute methamphetamine between May 1, and August 31, 1987. Two of the

nine overt acts supporting the conspiracy charge were based on conduct that had been the subject of the Missouri prosecution. Id. The government also prosecuted Felix on related substantive charges. Id. at 1380-81.

The Court first rejected the argument that the Double Jeopardy Clause barred Felix's prosecution on the substantive drug offenses even though the government had presented evidence of those offenses at the earlier Missouri trial. "Felix was charged in the Missouri case only with attempting to manufacture methamphetamine in Missouri, in late August 1987" while in the Oklahoma case, he "was charged with various drug offenses that took place in Oklahoma in June and July 1987." Id. at 1382. The Court explained: "The actual crimes charged in each case were different in both time and place; there was absolutely no common

conduct linking the alleged offenses." Id.

The Court further stated that although evidence of the Oklahoma transactions was admitted at the Missouri trial, it was introduced simply to "help show Felix' state of mind" and that "he was not prosecuted in the Missouri trial for any offense other than the Missouri attempt offense. . . ." Id. (emphasis in original). Citing Dowling v. United States, 493 U.S. 342 (1990), the Court observed: "[T]he introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." Id. at 1383.

The Court next rejected the argument that the prosecution of Felix on the Oklahoma conspiracy charge violated double jeopardy because two of the nine overt acts supporting the conspiracy charge concerned conduct for which Felix

had been previously prosecuted in Missouri. Id. at 1383-85. The Court refused to apply Grady in this context: "Taken out of context, and read literally, this language [in Grady] supports the defense of double jeopardy. But we decline to read the language so expansively, because of the context in which Grady arose and because of difficulties which have already arisen in its interpretation." Id. at 1383-84.

The Court rejected the double jeopardy claim because of "long established precedent," id. at 1383, holding that conspiracy to commit an offense and the offense itself "are separate offenses for double jeopardy purposes." Id. at 1385. The Court then addressed the basis of Grady's holding, stating that although the traffic offenses in that case "were not technically lesser-included offenses of the homicide and assault charges,"

they were analogous to charges discussed in Illinois v. Vitale, 447 U.S. 410 (1980), which the Court had labeled a "'species of lesser included offense.'" Felix, 112 S. Ct. at 1384. In Vitale, the Court stated in dicta that a traffic conviction for failure to reduce speed might be viewed as a "'species of lesser included offense'" if the State relied on the conduct underlying that conviction to prosecute the motorist on a manslaughter charge arising from the same accident. Id. at 1384 (citing Vitale, 447 U.S. at 420). In Grady, the Court "simply adopted the suggestion [it] had previously made in dicta in Vitale." 112 S. Ct. at 1384.

The Court then distinguished between cases involving a "'single course of conduct'" and those involving "multi-layered conduct as to time and place." Id. at 1385. Although reliance on a

lesser-included offense analysis may be useful in the former situation, it is "much less helpful in analyzing" the latter. Id. (citing Garrett v. United States, 471 U.S. 773 (1985)[)].

Felix therefore suggests that the Grady rule applies in cases where the criminal activity was limited to a "single course of conduct" rather than to cases involving certain types of "multi-layered conduct." See United States v. McHan, 966 F. 2d 134, 140-41 (1992) (as amended). If a single course of conduct is involved, we must then determine whether one of the charged offenses is a "species of lesser included offense" of a greater offense charged in a separate prosecution. See Sharpton v. Turner, 964 F.2d 1284, 1288 (2d Cir. 1992).

We first consider the threshold issue of the nature of the conduct involved. The evidence admitted in his two

trials showed that on November 22, 1985, McIntyre entered a car dealership in Kirkwood, Missouri, and arranged to go on a test drive with a salesman, Steven George. While George was getting the keys to the demonstrator car, McIntyre remained in the showroom looking at another car that had keys in its ignition that were similar to the keys of the demonstrator car. After McIntyre took the test drive with George, he gave a set of keys to the salesman. About fifteen minutes after McIntyre left the dealership, George and another salesman discovered that the demonstrator's keys were missing and that the keys returned by McIntyre were the keys to the showroom model.

Two days later, on November 24, two police officers spotted McIntyre driving the stolen car. After a pursuit, the officers stopped the car and arrested

McIntyre and a passenger. The officers discovered the missing keys in the car's ignition.

A circuit court jury in the City of St. Louis found McIntyre guilty of first-degree tampering, Mo. Rev. Stat. § 569.080 (1986), based on his unauthorized operation of the car on November 24 with the knowledge that he lacked the owner's consent. A circuit court jury in the County of St. Louis later found McIntyre guilty of felony stealing, Mo. Rev. Stat. § 570.030 (1986), based on his taking the same car without the owner's consent for the purpose of withholding it permanently from the owner.

The criminal activity at issue here--stealing a car and then driving it--is not the type of "multilayered conduct as to time and place" that the Court exempted from the Grady rule in Felix. See 112 S. Ct. at 1385. Clear

support for this conclusion appears in Felix, where the Court distinguished multilayered conduct from the "'classically simple situation presented in Brown [v. Ohio].'" Id. (citing Garrett, 471 U.S. at 789).

In Brown v. Ohio, 432 U.S. 161 (1977), the Court applied the double jeopardy rule of Blockburger v. United States, 284 U.S. 299, 304 (1932), to bar a subsequent prosecution for auto theft after the defendant had earlier been convicted of joyriding in connection with the same automobile. Brown, 432 U.S. at 168-70. Like McIntyre, the Brown defendant stole a car and drove it for several days. Id. at 162.[3]

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[3]Brown does not control this case because under Missouri law, tampering is not a lesser included offense of stealing. State v. Rivers, 663 S.W.2d

We conclude that McIntyre's criminal activity was as "classically simple" as that of the Brown defendant, and involved a "single course of conduct" rather than "multilayered conduct." See United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009-11 (1991). This determination does not settle the question, however, as to whether Grady renders unconstitutional McIntyre's second prosecution. We must also consider whether the two offenses of which McIntyre was convicted, first-degree tampering and stealing, are of such a character that one may be considered a "species of lesser included offense" under Felix.

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(Footnote Continued)
255, 256 (Mo. Ct. App. 1983). In Brown, joyriding was a lesser included offense of auto theft under Ohio law. Brown, 432 U.S. at 168.

In the tampering case, the court stated in its charge to the jury that McIntyre could not be found guilty unless jury members found that he knowingly operated the car in question, that he lacked the owner's consent to do so, and that he had knowledge of that lack of consent. In the stealing trial, the jury charge stated that McIntyre could not be found guilty unless jury members found that he took the automobile in question, that he did so without the consent of the owner, and that he did so for the purpose of withholding it permanently from the owner. (938 F.2d at 906).

Neither one of these offenses is a lesser-included offense of the other under the Blockburger standard, for each requires proof of an element that the other does not. See Blockburger, 284 U.S. at 304. Felix teaches, however, that even if one offense is "technically"

not a lesser-included offense, it still may be considered a "'species of lesser included offense.'" Felix, 112 S. Ct. at 1384. Although the Court in Felix did not define that phrase, its discussion indicated that a "species of lesser included offense" would include an "offense that is a permissible but not necessary predicate[]" of a greater offense. Sharpton, 964 F.2d at 1288. This type of lesser offense was at issue in Grady, where "the State sought to rely on the two previous traffic offense convictions to sustain the homicide and assault charges . . . ." Felix, 112 S. Ct. at 1384.

We conclude that on the facts of this case, the first-degree tampering charge must be viewed as a species of lesser-included offense of the greater offense of stealing under the Felix analysis. As in Grady, the government relied on conduct for which McIntyre had already

been convicted to sustain the later charge. See McIntyre, 938 F.2d at 906. Although it is not necessary to rely on a thief's unauthorized operation of a car to prove that he stole the car, in this case the government relied on that conduct (which constituted the entirety of the tampering case) to prove that McIntyre stole the car. Thus, the tampering conviction was a "species of lesser included offense."

The final issue raised by Felix is whether the government actually prosecuted McIntyre in his first trial for the activities that were later used to prove the stealing charge. See Felix, 112 S. Ct. 1382-83. In Felix, the Court made clear that the "introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." Id. at 1383. The Court then concluded that the

introduction of the Oklahoma transactions to prove intent at the Missouri trial did not constitute "prosecution" for the Oklahoma transactions. Id. The government "simply introduced those transactions as prior acts evidence under Rule 404(b)." Id.

A far different situation is presented here. The government, to establish essential elements of the stealing charge, proved conduct--operating an automobile without the owner's consent--for which McIntyre had actually been prosecuted. See McIntyre, 938 F.2d at 906. Unlike Felix, the government here did not introduce conduct pertaining to a separate crime at the first trial simply to help prove an element of the crime charged; rather, the conduct the government proved constituted the entirety of the crime prosecuted at the first trial. Moreover, the same conduct was proved to

establish nearly the entirety of the offense charged in the second prosecution. See id.

Having analyzed the concerns raised by Felix, we again hold that the prosecution of McIntyre for stealing violated the Fifth Amendment's prohibition against double jeopardy. We are not persuaded by the government's argument that McIntyre was prosecuted at the first trial only for tampering and at the second trial only for stealing. In the stealing trial, the government proved the same conduct it had proved to establish the entirety of the tampering offense; significantly, it proved that conduct to establish nearly the entirety of the stealing charge. McIntyre, 938 F.2d at 906. This was not a situation involving a "mere overlap" in proof. See Felix, 112 S. Ct. at 1382 ("a mere overlap in proof between two prosecutions does not establish a

double jeopardy violation"). The same conduct was proved at both trials to establish charges that were nearly identical.

We also are not persuaded by the State's argument that the tampering offense and the stealing offense occurred on different days. As we stated in our first opinion, "'The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.'" 938 F.2d at 906 (citing Brown, 432 U.S. at 169).

For the foregoing reasons, we reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus.

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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No. 89-2700

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| Terry D. McIntyre, | * | |
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| Appellant, | * | Appeal from the |
| | * | United States |
| v. | * | District Court for |
| | * | the Eastern |
| Myrna Trickey, | * | District of |
| | * | Missouri. |
| Appellee. | * | |

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Submitted: January 11, 1991

Filed: July 15, 1991

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Before MCMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

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JOHN R. GIBSON, Circuit Judge.

Terry B. McIntyre appeals from the district court's denial of his petition for writ of habeas corpus based on a claim of double jeopardy. McIntyre argues that the government, to establish essential elements in his prosecution for stealing, proved conduct that constituted

an offense, first degree tampering, for which he had earlier been convicted, thus violating the double jeopardy rule announced in Grady v. Corbin, 110 S. Ct. 2084 (1990). The State argues that: 1) McIntyre is procedurally barred from asserting his double jeopardy claim; and that 2) McIntyre cannot assert a Grady claim, as Grady announced a "new rule" that is not retroactively available to federal habeas petitioners. Moreover, the State argues that even if Grady applies, McIntyre cannot prevail under the rule of that case. The magistrate, whose report and recommendation the district court adopted, did not analyze McIntyre's double jeopardy claim under Grady, as Grady had not yet been decided. We reverse the district court's order.

In June 1986, a jury in the circuit court of the City of St. Louis found McIntyre guilty of first degree tampering

under Mo. Rev. Stat. §569.080 (1986), based on his operation on November 24, 1985, of an automobile knowing that he lacked the owner's consent. The Missouri Court of Appeals affirmed the conviction. State v. McIntyre, 735 S.W.2d 111 (Mo. Ct. App. 1987).

In February 1987, a jury in the circuit court in the County of St. Louis found McIntyre guilty of felony stealing under Mo. Rev. Stat. § 570.030 (1986), based on his stealing of that same automobile from a car dealership on November 22, 1985. The Missouri Court of Appeals, rejecting McIntyre's double jeopardy claim, affirmed the conviction. State v. McIntyre, 749 S.W.2d 420 (Mo. Ct. App. 1988). On each conviction, McIntyre was sentenced as a persistent offender to ten years imprisonment, with the second sentence to run consecutively to the first.

The evidence presented at both trials established that on November 22, 1985, a man who identified himself only as "Johnny" entered the Mitsubishi dealership in Kirkwood, Missouri, and told salesman Steven George that he wanted to test drive a Mitsubishi Galant. While George was getting the keys to a Galant demonstrator, "Johnny" remained in the showroom where he was looking at the interior of another Galant. The showroom car had keys in its ignition, and those keys were similar to the keys of the demonstrator Galant. After "Johnny" took a test drive with George, he gave a set of Galant keys to George, who returned them to the dealership's "key board." About 15 minutes after "Johnny" left the dealership, George and another salesman discovered that the demonstrator Galant was missing and that the keys which George had placed on the board were from

the showroom Galant at which "Johnny" had been looking. "Johnny" was the only person who had taken a ride with George in the demonstrator Galant on that day.

On November 24, 1985, two Kirkwood police officers spotted McIntyre driving the demonstrator Galant, which had been listed on a "hot sheet" of stolen cars. After a pursuit, the officers stopped the car and arrested McIntyre, who was driving, and a passenger. When the car was stopped, the missing Galant keys were in the ignition.

In a photographic line-up on November 27, George identified McIntyre as "Johnny." George testified at both of McIntyre's trials, as did Jake Naughton, general manager of the Mitsubishi dealership. Officer Kenneth Hornak, one of the two arresting officers, testified at the tampering trial, while the other officer,

Lawrence O'Toole, testified at both trials.

McIntyre first raised his double jeopardy claim prior to his trial on the stealing charge, and he unsuccessfully reasserted this claim on appeal. McIntyre, 749 S.W.2d at 422.

Nothing appears in the record regarding McIntyre's post-conviction proceedings in Missouri state courts. The State admitted in its response to McIntyre's federal habeas petition that McIntyre had exhausted all state remedies on his double jeopardy claim and was not procedurally barred. See Response to Order to Show Cause at 3. In a November 1988 report and recommendation, the magistrate stated that the State had conceded exhaustion. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 2 (magistrate's report) (E.D. Mo. Nov. 2, 1988).

McIntyre has restricted his federal habeas litigation to his double jeopardy claim. In his original federal petition, filed pro se, McIntyre did not cite Grady (as that case had not yet been decided), but he did clearly and thoroughly assert a double jeopardy claim.

In his November 1988 report, the magistrate recommended denying McIntyre's petition because under Missouri law, tampering is not a lesser included offense of stealing the same vehicle. Slip op. at 3-4 (magistrate's report) (November 2, 1988). The district court adopted the magistrate's report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Nov. 22, 1988). After McIntyre refined and reasserted his claim in a motion to alter or amend judgment, the magistrate issued a second report, again recommending denial of McIntyre's petition. The magistrate

reconsidered McIntyre's claim under the "same evidence test"[1] and concluded that despite the use of the same evidence at both trials, the evidence submitted at the tampering trial was not legally sufficient to convict McIntyre of stealing. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 12 (magistrate's report) (E.D. Mo. Aug. 8, 1989). The district court adopted the magistrate's second report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Sept. 18, 1989).

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[1]Prior to Grady, several circuits had developed a "same evidence" test that looked at whether "the evidence required to support conviction in one of the prosecutions is sufficient to support conviction in the other prosecution." United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); See also Grady, 110 S. Ct. at 2094 n.14; United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988).

Through appointed counsel, McIntyre now presents this double jeopardy claim to this court.

I.

While McIntyre contends that he is entitled to relief under Grady, the State asserts that we must not reach the merits of the Grady claim because: 1) McIntyre asserted a new type of double jeopardy claim in his motion to alter or amend before the district court that was not presented in his original federal habeas petition; 2) the rule of Teague v. Lane, 489 U.S. 288 (1989), bars the application of Grady because McIntyre's conviction was final before Grady was announced.

The State's first argument can be summarized as follows: In his original habeas petition, McIntyre argued that his double jeopardy claim should be analyzed under the "same offense" test applied in Brown v. Ohio, 432 U.S. 161 (1977).

Because McIntyre in his motion to alter or amend urged the court to instead apply the "same evidence" test, he presented a claim different from the one he originally asserted. The State contends that McIntyre's failure to assert the "same evidence" test in his initial federal habeas petition constituted "abuse of the writ" under 28 U.S.C. § 2254, Rule 9(b) (1988), and also resulted in procedural default because McIntyre failed to exhaust the "same evidence" theory in the state courts.

The magistrate's second report, which the district court also adopted, rejected the State's arguments regarding abuse of the writ and procedural default. The magistrate concluded that the court should address the merits of McIntyre's claim because his motion did not present a new claim, but merely "clarif[ied]" the

existing one. Slip op. at 4 (magistrate's report) (Aug. 8, 1989).

The State's argument rests solely on its contention that McIntyre raised a new theory in his motion to alter or amend judgment that he had not presented in his original federal habeas petition. In its response to McIntyre's original federal petition, the State had conceded that McIntyre had exhausted his double jeopardy claim before the state courts and was not procedurally barred from raising the claim presented in that initial petition.

An examination of the pleadings that McIntyre submitted in connection with his initial petition and with his motion to alter or amend judgment establishes that, contrary to the State's argument, the substance of his claim remained essentially the same. In both the original petition and the motion to alter or amend, McIntyre argued that the

government used the same evidence to convict him at both trials, thus violating the Fifth Amendment's double jeopardy clause. Although McIntyre conceded in his motion to alter or amend that Brown v. Ohio, which he had relied on in his original petition, was not persuasive authority for his argument, he otherwise relied on the same authority and asserted the same basic argument.

As McIntyre presented essentially the same claim in his motion to alter or amend judgment as he presented in the original habeas petition, we conclude that the State's arguments regarding abuse of the writ and procedural bar are without merit.[2] We therefore affirm the

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[2]The State cites two cases, Buckley v. Lockhart, 892 F.2d 715, 719 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990), and Gilmore v. Armontrout, 861

district court's order adopting the magistrate's report and recommendation on this issue.

II.

The State next argues that Teague v. Lane, which held that federal habeas petitioners may not attack their conviction by relying on a rule of law established after their conviction became final, 489 U.S. at 310, prevents McIntyre from relying on Grady.[3] McIntyre counters that Grady did not announce a "new rule" under Teague, but merely built upon

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(Footnote Continued)
F.2d 1061, 1064-65 (8th Cir. 1988), cert. denied, 490 U.S. 1114 (1989), to support its arguemnt that McIntyre is procedurally barred on his same evidence theory. These cases are clearly distinguishable from the one before us, as the essence of McIntyre's claim remained the same.

[3]Direct review of McIntyre's second conviction was complete in May 1988. The Supreme Court announced Grady in May 1990.

the Court's previous double jeopardy decisions, including Illinois v. Vitale, 447 U.S. 410 (1980).

Under Teague, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original). See also Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (test is whether a state court considering petitioner's claim at the time the conviction became final "would have felt compelled by existing precedent to conclude that the rule [petitioner sought] was required by the Constitution").

Grady held that "a subsequent prosecution must do more than merely survive the Blockburger test." 110 S. Ct. at 2093. See Blockburger v. United States, 284 U.S. 299, 304 (1932). (double jeopardy clause is not violated if each statute

requires proof of a fact which the other does not). Even if the Blockburger "same offense" test is satisfied, the double jeopardy clause still bars the "subsequent prosecution [if] the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093.

An examination of Grady establishes that this rule was not dictated by precedent existing at the time McIntyre's conviction became final, and thus, was a new rule. In fact, the Grady Court explicitly stated that it was "adopt[ing] the suggestion set forth in Vitale." 110 S. Ct. at 2087 (emphasis added). See also id. at 2093 ("As we suggested in Vitale. . . .") (emphasis added).

Justice Scalia's dissenting opinion in Grady, joined by Justices Rehnquist

and Kennedy, leaves no doubt that the dissent also regarded the Grady test as a new rule. The dissent attacked the majority for "departing from clear text and clear precedent with no justification except the citation of dictum in a recent case (dictum that was similarly unsupported and inconclusive to boot)." 110 S. Ct. at 2096 (Scalia, J., dissenting).

An examination of Vitale, relied on by the Grady majority, confirms that Grady indeed announced a new rule. While Vitale merely urged an expanded approach to double jeopardy analysis, see Vitale, 447 U.S. at 420, Grady explicitly prescribed a new test to be applied in cases involving subsequent prosecutions that do not violate the Blockburger rule. As the Grady rule was not "dictated" by precedent, we conclude that it is therefore a "new rule" under Teague.

Our analysis of the Teague issue does not, however, end with our conclusion that Grady announced a new rule. Despite the general bar on retroactive application of new rules for cases on collateral review, new rules under Teague are fully retroactive if they fit into one of two exceptions. Teague, 490 U.S. at 311.

Teague stated that a habeas petitioner may rely on a new rule: 1) "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"; or 2) "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Id. As a double jeopardy rule does not concern the fairness of the procedures used to convict, the second exception is not applicable here.

The first exception, narrowly defined in Teague, was expanded in Penry v. Lynaugh, 492 U.S. 302 (1989), a case addressing the constitutionality of imposing the death penalty on mentally retarded defendants. Although Teague described the first exception as "focusing solely on new rules according constitutional protection to an actor's primary conduct," id. at 329, Penry suggested that the first exception also encompasses "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." Id. Deciding that a new rule prohibiting the execution of mentally retarded defendants would fit within the first Teague exception, the Court explained:

> "[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution

> itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity [expressed in Mackey v. United States, 401 U.S. 667 (1971)] have little force."

492 U.S. at 330. The Penry Court added: "'There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" Id. (citing Mackey, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). Thus, the first Teague exception "cover[s] not only rules forbidding criminal punishment of certain kinds of primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 429 U.S. at 330.

In Butler v. McKellar, 110 S. Ct. 1212 (1990), and Saffle v. Parks, 110 S. Ct. 1257 (1990), the Court described the

first Teague exception as encompassing "'categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders.'" Butler, 110 S. Ct. at 1218 (emphasis added). See also Saffle, 110 S. Ct. at 1263 (same). Thus, the Court cited the rule discussed in Penry as an illustrative example of a categorical constitutional guarantee, but did not use that rule to limit the scope of the exception.

The Fifth Amendment states that "[n]o person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court labeled the double jeopardy clause a "basic constitutional guarantee," id. at 718, and quoted an 1873 case that stated: "'If there is anything settled in the jurisprudence of England

and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court on the same facts, for the same statutory offense.'" Id. at 717-718 (quoting Ex Parte Lange, 18 Wall. 163, 168 (U.S. 1873)).

The protection afforded by the double jeopardy clause operates at an elemental level. The purpose of the clause is not to ensure the fairness of the trial, but to prevent the trial from taking place at all. See Robinson v. Neil, 409 U.S. 505, 509 (1973). Because it bars an unconstitutional prosecution, a rule concerning double jeopardy is analogous to the rule discussed in Penry, which would have barred the imposition of an unconstitutional punishment. See

Penry, 492 U.S. at 329-30. It thus follows that the prohibition on double jeopardy is a "categorical guarantee[] accorded by the Constitution." See Butler, 110 S. Ct. at 1218. We therefore conclude that a rule concerning double jeopardy, such as the Grady rule, falls under the first Teague exception and must be accorded full retroactive effect.

Our conclusion finds further support in the pre-Teague opinion of Robinson v. Neil, in which the Court accorded full retroactive effect to the double jeopardy rule it had earlier announced in Waller v. Florida, 397 U.S. 387 (1970). In Robinson, the Court refused to apply the prevailing standard, as prescribed in Linkletter v. Walker, 381 U.S. 618 (1965), for determining the retroactivity of constitutional rules. It stated that a rule concerning double jeopardy did not "readily lend[] itself" to a Linkletter

analysis. Robinson, 409 U.S. at 507. The Court reasoned that while the double jeopardy guarantee, like other constitutional guarantees, is a right of the criminal defendant, "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." Id. at 509.

Although Robinson has been superseded by Teague, we believe that the Robinson Court's observation about the nature of the double jeopardy guarantee retains its force and is relevant to the issue before us. Because the double jeopardy clause prevents an unconstitutional trial from taking place, it deprives the court of jurisdiction. Historically, federal habeas review has existed to permit convicted prisoners to challenge the jurisdiction of the trial court. See 3 W.

LaFave & J. Israel, Criminal Procedure § 27.3(a) (1984).

We therefore hold that although Grady announced a new rule, that rule is nonetheless available to petitioners challenging their convictions on collateral review.

III.

We now address the merits of McIntyre's double jeopardy claim. McIntyre argues that he is entitled to relief under Grady because his conviction for stealing relied on proof of conduct for which he had already been prosecuted. The State counters that McIntyre's double jeopardy rights were not violated because the tampering prosecution concerned conduct that occurred on the day that he was caught operating the car, while his stealing trial concerned conduct that occurred on the day he stole the car.

There is no dispute that Grady provides the relevant standard. The Supreme Court intended Grady "to guide double jeopardy analysis in all cases involving successive prosecutions." United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990), petition for cert. filed, No. 90-1527 (Apr. 3, 1991). See also United States v. Easley, 927 F.2d 1442, 1451 (8th Cir. 1991).

Once a subsequent prosecution survives the Blockburger test, the court must next analyze if "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093. In Grady, the Court held that this rule barred the subsequent prosecution of a motorist for criminally negligent homicide and assault after he had earlier

pled guilty to driving while intoxicated and failing to keep to the right of the median in connection with the same collision. Id. at 2094. The Court stated:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted -- driving while intoxicated and failing to keep to the right of the median -- to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution. . . .

Id.

The Court added, however, that its holding would not bar a subsequent prosecution on the homicide and assault charges if the State relied solely on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. The Court clarified its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from

introducing that same evidence in a subsequent proceeding." Id. at 2093. It explained: "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id.

Under Grady, we must answer two questions: 1) Is the conduct the indictment requires to be proven conduct that constitutes an offense for which the defendant has previously been prosecuted? and 2) Is it being proven to establish an essential element of the offense for which the defendant is now being prosecuted? See United States v. Felix, 926 F.2d 1522, 1532 (10th Cir. 1991) (Anderson, J., dissenting), petition for cert. filed, No. 90-1599 (Apr. 15, 1991).

In McIntyre's first trial, for tampering, the government presented the testimony of the two police officers who arrested McIntyre. They testified how

they spotted the stolen Galant, pursued the vehicle and stopped it, and apprehended the driver, who turned out to be McIntyre. One of the officers testified that Mitsubishi keys were found in the ignition.

Jake Naughton, manager of the Mitsubishi dealership, testified that he had observed McIntyre speaking to salesman George on the day the car was stolen, that he saw George and McIntyre leave together to go on a test drive, and that the keys returned to the key board did not belong to the demonstrator Galant. Naughton also testified that McIntyre's use of the car on the day of the arrest was without permission. In his testimony, George identified McIntyre as the man he had observed looking at the showroom Galant and whom he later accompanied on a test drive of the demonstrator car. George also testified that McIntyre,

after the drive, returned a set of Mitsubishi keys that were later discovered to be the keys to the showroom Galant. George also testified that he had examined the keys found in the car when McIntyre was apprehended, and that one of those keys belonged to the stolen car.

At the second trial, for stealing, the government presented essentially the same evidence. Again, Naughton and George testified as to the events that transpired at the dealership on November 22, 1985. One of the two arresting officers testified again, describing how he and his partner had observed the stolen car, pursued and stopped it, and apprehended McIntyre. The officer also testified that he saw keys in the ignition. The government also presented the testimony of a detective who had not testified at the first trial and who described the

photographic lineup in which George had identified McIntyre.

Applying the Grady test to the facts before us, we focus on the conduct the government proved, not the evidence it used to prove that conduct. See Grady, 110 S. Ct. at 2093.

In the first trial, the government proved first degree tampering by establishing that McIntyre was apprehended while operating the car, that McIntyre lacked the dealership's consent to operate the car, and that he operated the car knowing that he lacked the consent.[4]

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[4]The Court charged the jury in the tampering case as follows:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> > First, that on November 24, 1985, . . . the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Ga-

(Fo

While the testimony about the events at the car dealership did not directly concern McIntyre's operation of the car, it was relevant to the owner's lack of consent and McIntyre's knowledge that he lacked consent.

At the stealing trial, the government proved the same conduct that it had proved to establish the entirety of the tampering offense. Thus, the answer to the first inquiry under Grady -- whether the conduct being proven is conduct that

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(Footnote Continued)
lant, owned by Kirkwood Mitsubishi; and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated knowing that he did so without the consent of the owner, then you will find the defendant guilty of tampering in the first degree. . . .

constitutes a previously prosecuted offense -- must be "yes".

The second step in our analysis focuses on whether the conduct was proved to "establish an essential element" in the second prosecution. The elements of stealing, as stated in the charge to the jury, are:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First . . . the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and
>
> Second, the defendant did so without the consent of Kirkwood Mitsubishi, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,
>
> then you will find the defendant guilty of felony stealing.

The conduct constituting the tampering offense was proved in the second

trial to establish essential elements of the stealing charge. The testimony regarding the visit to the car dealership, together with the testimony concerning McIntyre's operation of the car, proved the entirety of the tampering offense, and nearly the entirety of the stealing offense. The only new witness presented by the government at the stealing trial was Detective Schneedle, who testified regarding the photographic lineup and George's identification of McIntyre. Even accepting that this testimony was necessary to help establish the first element of the stealing charge, the conduct proved at the first trial established the whole of the next two elements -- the owner's lack of consent and McIntyre's purpose of withholding the car permanently from the owner.

Therefore, we conclude that McIntyre's second prosecution violated

the rule of Grady because the government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted. See Grady, 110 S. Ct. 2093.

The State tries to distinguish from Grady by arguing that McIntyre was convicted of tampering based on the events that occurred on November 24, 1985, and that he was convicted of stealing based on events that occurred on November 22, 1985.

We are not persuaded by this argument. At both trials, the government proved McIntyre's conduct on both dates to establish the various elements of both tampering and stealing. We also note the Court's admonition in Brown v. Ohio, 432 U.S. 161, 169 (1977): "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its

limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." See also United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990) (discussing the auto stealing and joyriding prosecutions at issue in Brown as constituting a single course of conduct and distinguishing that case from those involving a continuous criminal enterprise), cert. denied, 111 S.Ct. 2010 (1991).

We therefore hold that the government's prosecution of McIntyre for stealing violated the Fifth Amendment's guarantee against double jeopardy. For the foregoing reasons, we reverse the judgment of the district court, and remand with instructions to grant the writ of habeas corpus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| TERRY D. McINTYRE, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM L. WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri,[1] | ) | |
| | ) | |
| Defendant. | ) | |

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

This cause is before the Court on the petition of Missouri state prisoner Terry D. McIntyre for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for review and a

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[1]Because petitioner is challenging a sentence to be served in the future, William L. Webster, Attorney General for the State of Missouri, is a proper party respondent. 28 U.S.C. §2254, Rule 2(b). Myrna Trickey is a proper, but nominal, party respondent. Id.

recommended disposition. 28 U.S.C. §636(b).

In 1987, petitioner Terry D. McIntyre was convicted of first-degree tampering and stealing a motor vehicle by the Circuit Courts of the City of St. Louis and St. Louis County, respectively. He was sentenced to two ten-year terms of imprisonment, said sentences to run consecutively. Petitioner is presently incarcerated at the Missouri Eastern Correctional Center in Pacific, Missouri. Petitioner is herein challenging only his conviction and sentence for stealing a motor vehicle from the Circuit Court of St. Louis County; he does not challenge his first-degree tampering conviction from the Circuit Court of the City of St. Louis in the instant action. Petitioner's conviction and sentence from the Circuit Court of St. Louis County were affirmed on direct appeal. State of

Missouri v. McIntyre, 749 S.W.2d 420 (Mo.App. 1988). (Resp. Exh. E.)

On September 2, 1988, petitioner filed the instant petition for a writ of habeas corpus. He asserts one ground for relief: his conviction for stealing a motor vehicle violates his Fifth Amendment right against double jeopardy. Specifically, petitioner argues that the evidence used against him in the prosecution of the tampering charge was also utilized to gain a conviction in the stealing charge. Petitioner contends that the tampering and stealing a motor vehicle offense constitute the same offense.

In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised the instant ground for federal habeas relief amongst several others. (Resp. Exh. C, at 4-5). Respondent concedes that this ground is

exhausted. (Response to Order to Show Cause, at 3-4.) Therefore, this ground may be addressed on the merits by this Court. Purnell v. Missouri Department of Corrections, 753 F.2d 703, 708 (8th Cir. 1985).

Petitioner relies upon Brown v. Ohio, 432 U.S. 161 (1977) to support his argument that his right against double jeopardy was violated. In Brown, the defendant was arrested for "joy riding," pled guilty, and served a short jail sentence. Id., at 162-64. Upon his release, he was charged with automobile theft of the same vehicle. Under Ohio law the misdemeanor of "joy riding" was included in the felony of automobile theft. Id. The Supreme Court reversed the conviction on double jeopardy grounds even though the acts of theft and "joy-riding" occurred on different dates. Id., at 168-170.

Although petitioner argues that the facts of his case are identical to the facts of Brown, the undersigned concludes that they are not identical. Under Missouri law, tampering with a motor vehicle is not a lesser-included offense of stealing the same vehicle. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422; State of Missouri v. Smith, 655 S.W.2d 626, 627-28 (Mo. App. 1983); State of Missouri v. Rivers, 663 S.W.2d 255, 256 (Mo. App. 1983); State of Missouri v. Gobble, 675 S.W.2d 944, 948-49 (Mo. App. 1984); State of Missouri v. Souders, 703 S.W.2d 909, 911 (Mo. App. 1985). Furthermore, the Missouri Court of Appeals found that "the tampering was not a part of the stealing that had occurred two days earlier" for which petitioner was subsequently convicted and sentenced in the Circuit Court of the City of St.

Louis. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422.

This Court cannot reinterpret Missouri statutes after a finding of state law made by a state appellate court. Wilkerson v. Wyrick, 806 F.2d 161, 164 (8th Cir. 1986); Harkins v. Wyrick, 589 F.2d 387, 391 (8th Cir. 1979) Because tampering is not a lesser-included offense of stealing a motor vehicle under Missouri law, the undersigned concludes that there is no violation of petitioner's right against double jeopardy.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the petition of Terry D. McIntyre for a writ of habeas corpus be denied without further proceedings. The parties are advised that they have eleven (11) days to file written objections to this Report and Recommendations.

--David D. Noce---------
UNITED STATES MAGISTRATE

Signed this 2nd day of November, 1988.

92-1465

No. 92-_____

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

**In the**
**Supreme Court of the United States**
October Term, 1992

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,
and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

*Petitioners,*

vs.

TERRY D. McINTYRE,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume II)

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*Attorneys for Petitioners*

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

| | | |
|---|---|---|
| **PAUL CASPARI, Superintendent, Missouri Eastern Correctional Center, and JEREMIAH W. NIXON, Attorney General of Missouri,** | ) | |
| **Petitioners,** | ) | |
| **vs.** | ) | No. 92-_____ |
| **TERRY D. McINTYRE,** | ) | |
| **Respondent.** | ) | |

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| TERRY D. McINTYRE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri, | ) | |
| | ) | |
| Respondents. | ) | |

ORDER

This matter is before the Court on the petition of Terry D. McIntyre for a writ of habeas corpus. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Petitioner has objected thereto.

After consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that the petition of Terry D. McIntyre for a writ of habeas corpus is DISMISSED.

Dated this 22nd day of November, 1988.

--Edward L. Filippine---
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| TERRY D. McINTYRE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri, | ) | |
| | ) | |
| Respondents. | ) | |

**ORDER**

This cause has been remanded to the undersigned for consideration of petitioner's motion to alter or amend judgment, filed December 2, 1988. 28 U.S.C. §636(b).

Petitioner's petition for a writ of habeas corpus argued that his conviction in the Circuit Court of St. Louis County was unconstitutional under the Double Jeopardy clause because of his prior conviction in the Circuit Court of the City of St. Louis. The petition was

denied primarily because Missouri courts have held that tampering with a motor vehicle (City court conviction) is not a lesser-included offense of stealing the same vehicle (County court conviction).

Petitioner relied primarily on Brown v. Ohio, 432 U.S. 161 (1977) in his original petition for a writ of habeas corpus. Although Brown arguably supports the theory petitioner advances in the current motion, factual distinctions between that case and this one made Brown relatively weak authority for his position. See, Brown, supra, 432 U.S. at 166-67 n.6.

The aspect of petitioner's argument which becomes clearer in the current motion is that while the lesser-included offense test is the appropriate test for Double Jeopardy violations involving multiple convictions in a single trial, his situation involved convictions

imposed in successive prosecutions. He correctly argues that a different test should have been applied:

> Where the plea is against the imposition of cumulative sentences for multiple convictions obtained at a single criminal trial, double jeopardy's role is limited to assuring that the sentencing court does not exceed its legislative authorization by imposing more than one punishment for something the legislature has defined as a single crime. Brown [v. Ohio, supra], 432 U.S. at 165 . . .. In this context, the established test for determining whether two offenses are the "same" is that first set forth in Blockburger v. United States, 284 U.S. 299, 304 . . . (1932). The Blockburger test, which is essentially one of legislative intent, focuses on the formal elements of the two crimes, finding them to be different offenses if each requires proof of a fact which the other does not. Id.
>
> . . . The general test for determining whether successive prosecutions involve the "same offense" is . . . a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them.

> Under this "same evidence" test, the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged.

United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988) (citations omitted); see, United States v. Reiter, 848 F.2d 336, 341 (2nd Cir. 1988).

Under the latter test, which is applicable in this case, the appropriate inquiry is whether the evidence actually adduced at petitioner's first trial (for first-degree tampering) would have sufficed to support his subsequent conviction (for automobile theft). Although the record before this Court is insufficient to make such a determination, it appears that in petitioner's trial for tampering, the state introduced evidence tending to prove that petitioner had stolen the vehicle in question. The Missouri Court of Appeals ruled that such

evidence was admissible on the ground that evidence linking petitioner with the theft of the car tended to establish his knowledge that he was operating the car without the consent of the owner, which was an element of the state's case in the tampering conviction. State of Missouri v. McIntyre, 735 S.W.2d 111, 112 (Mo. App. 1987).

It thus appears petitioner has set out a viable ground for granting the motion to amend or alter the judgment. However, since issues have been raised to which the respondent has not had the opportunity to respond, and since the trial records are not presently part of the record before the Court, this matter should be stayed pending submission of briefs and documentation by the parties.

In view of the above discussion,

**IT IS HEREBY ORDERED** that respondent file a response to petitioner's motion

within twenty (20) days. Respondent shall include the records of petitioner's trials in her response. After respondent files her response, petitioner may have twenty (20) days thereafter to file a traverse with the Court. The Clerk of the Court shall provide respondent a copy of petitioner's December 2, 1988 motion to alter or amend judgment along with a copy of this order.

--David D. Noce----------
UNITED STATES MAGISTRATE

Signed this 24th day of April, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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|---|---|---|
| TERRY D. McINTYRE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri, | ) | |
| | ) | |
| Respondents. | ) | |

**REPORT AND RECOMMENDATION**
**OF UNITED STATES MAGISTRATE**

This cause has been remanded to the undersigned United States Magistrate for consideration of the motion to alter or amend judgment filed by petitioner Terry D. McIntyre. 28 U.S.C. §636(b).

In his petition for a writ of habeas corpus, McIntyre argued that his conviction in the Circuit Court of St. Louis County was unconstitutional under the Double Jeopardy clause because of his prior conviction in the Circuit Court of the City of St. Louis. The petition was

denied in part because Missouri courts have held that tampering with a motor vehicle (City court conviction) is not a lesser-included offense of stealing the same vehicle (County court conviction).[1]

Petitioner relied primarily on Brown v. Ohio, 432 U.S. 161 (1977), in his original petition for a writ of habeas corpus. Although Brown arguably supports the theory petitioner advances in the current motion, factual distinctions between that case and this one made Brown relatively weak authority for his position. See, Brown, supra, 432 U.S. at 166-67 n.6. The aspect of petitioner's argument which becomes clearer in the current motion is that while the "lesser-

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[1]The undersigned hereby adopts and incorporates the Report and Recommendation filed on November 2, 1988, and the Order filed on April 24, 1989, except as may be noted herein.

included offense" test is the appropriate test for Double Jeopardy violations involving multiple convictions in a single trial, his situation involved convictions imposed in successive prosecutions. He correctly argues that a different test, the "same evidence" test, should have been applied. Under this "same evidence" test, the second prosecution is barred by the constitutional prohibition against double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged. United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988) (citations omitted); see, United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); United States v. Reiter, 848 F.2d 336, 341 (2nd Cir. 1988).

Respondents first argue that petitioner's motion to alter or amend the Court's judgment should be denied because

petitioner is actually seeking to add a new claim to his petition. This, respondents contend, constitutes abuse of the writ. Furthermore, respondents claim that petitioner cannot demonstrate "cause" for his failure to assert the "new double jeopardy claim" in his initial petition. Respondents argue that petitioner failed to present this aspect of his double jeopardy claim to the state courts. Therefore, his claim is procedurally barred from federal habeas review absent a showing of cause and prejudice pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977). Finally, respondents argue that petitioner's claim is "facially frivolous" because the City of St. Louis and St. Louis County are two different sovereigns.

"A district court has broad discretion in ruling upon a Rule 60(b) motion. . .." Cox v. Wyrick, No.

88-2602, slip op. at 3 (8th Cir. April 26, 1989). Rule 60(b) relief is appropriate "where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship." Id., quoting, Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989).

The undersigned concludes that petitioner's double jeopardy claim as now understood should be addressed by the Court so as to prevent an undue hardship to petitioner. Cox, supra, No. 88-2602, slip op. at 3. A pro se petitioner should not be held to the strict pleading requirements imposed upon attorneys especially where his initial petition generally invokes the basic constitutional protection he later alleges has been violated. See, e.g., Wallace v. Lockhart, 701 F.2d 719, 727 (8th Cir.), cert. denied, 464 U.S. 934 (1983); Hill v. Wyrick, 570 F.2d 748, 751-52 (8th

Cir.), cert. denied, 436 U.S. 921 (1978); see also, Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). The undersigned concludes that petitioner is not attempting to add a new claim to his petition but rather clarifying his pro se arguments.

Respondents next argue that petitioner's "new double jeopardy claim" was not presented to the state courts and is thus subject to a procedural bar in this proceeding. In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised a double jeopardy ground amongst several others. (Resp. Exh. C, at 4-5.) Although petitioner has now proposed a different (and correct) test for examining his ground, the constitutional basis of his claim has not changed after it was before the state courts. Petitioner has exhausted his federal habeas ground in the state

courts, and it may therefore be addressed in this proceeding. Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988).

Finally, respondent argues that petitioner's claim is frivolous and should be dismissed because he was tried and convicted by two different sovereigns -- the City of St. Louis and St. Louis County. Respondents contend that each jurisdiction was exercising its own sovereignty in prosecuting petitioner and that the Circuit Court of the City of St. Louis could not convict anyone of a crime which occurred in St. Louis County. This argument is without merit. The dual sovereignty doctrine provides that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the law of each, he has committed two distinct offenses for double jeopardy purposes. Heath v. Alabama, 474 U.S. 82, 88 (1985). In applying the

doctrine, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power." Id. The dual sovereignty principle's application cannot be restricted to cases in which two prosecuting sovereigns can demonstrate that if only one of them is allowed to exercise jurisdiction over the defendant, the second one's "legitimate interests" will not be vindicated. If the prosecuting entities are separate sovereigns, the circumstances of the case and the particular "interests" of each are not relevant to the other. Id., at 91-92.

The circuit courts of Missouri are granted jurisdiction over felony trials

by the State of Missouri. Mo. Const., Art. V, §14(a); R.S.Mo. §542.020 (1986). Thus, circuit courts for the City of St. Louis and St. Louis County "draw their authority to punish the offender" from the same source of power. Heath, supra, 474 U.S. at 88. These local governmental entities cannot be considered separate sovereigns for double jeopardy purposes. Id.; Waller v. Florida, 397 U.S. 387, 394-95 (1970). The double jeopardy clause bars successive prosecutions by a local government and a state in which it is located or by two local governments in the same state. Heath, supra, 474 U.S. at 88; Waller, supra, 397 U.S. at 395; Brown v. Ohio, supra, 432 U.S. at 169.

Turning to the merits of petitioner's federal habeas ground, it is again recognized that the appropriate inquiry is whether the evidence actually adduced at petitioner's first trial (for first-

degree tampering) would have sufficed to support his subsequent conviction (for automobile theft). Ragins, supra, 840 F.2d at 1188; see Tercero, supra, 580 F.2d at 314. The record before the Court now includes the transcript and legal file of petitioner's conviction in the City of St. Louis as well as the transcript of petitioner's trial in St. Louis County. (Supplemental exhibits filed May 12, 1989).

At the petitioner's trial for automobile tampering in the City of St. Louis, the prosecution witnesses included the arresting police officers (O'Toole and Harnak) and the general manager and salesman of the automobile dealership from which the vehicle at issue was stolen (Naughton and George). (Transcript, Vol. I and II.) Evidence was introduced regarding petitioner's arrest on November 24, 1985 for auto tampering in the

City of St. Louis. (Id., Vol. II, at 180-293.) This testimony clearly established that petitioner was operating the automobile in question. (Id.) Further testimony was received regarding petitioner's visit to the automobile dealership on November 22, 1985. (Id., at 294-350.) This evidence established that petitioner had visited the automobile dealership, taken a test drive in the vehicle with a salesman and departed the dealership shortly thereafter. Testimony was also given to the effect that petitioner had the opportunity to provide a different set of keys to the salesman and that after petitioner's departure, the vehicle was missing from the dealership. (Id.)

The defense introduced testimony by Betty Wehmeyer, the records officer at St. Mary's Honor Center where petitioner then resided. (Id., at 351-379.) Her

testimony and Honor Center records established that petitioner's whereabouts were accounted for at the time he was allegedly at the automobile dealership. (Id.) Petitioner also testified regarding his activities on the dates of November 22, 23 and 24, 1985. (Id., at 380-436.) Petitioner stated that he never visited the dealership and was at the Honor Center at the time he allegedly took a test drive and when the automobile was noticed as missing. (Id.)

The jury was given the following instruction (among others) to guide its deliberations:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on November 24, 1985, in the City of St. Louis, State of Missouri, the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi, and

> Second, that he operated the automobile without the consent of the owner, and
>
> Third, that he operated knowing that he did so without the consent of the owner,
>
> then you will find the defendant guilty of tampering in the first degree.
>
> However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, then you must find the defendant not guilty of that offense.

[Instruction No. 6, in accordance with MAI-CR 23.21, Resp. Exh. "Legal File" on appeal to the Missouri Court of Appeals, Eastern District, in Cause No. 51915, at 40.) The jury returned a verdict of guilty in accordance with this instruction. (Id., at 44.)

At petitioner's trial for automobile theft, the prosecution again presented the testimony of the dealership general manager and the salesman (Naughton and George). (Resp. Exh. A, at 20-38,

55-63.) Their testimony was essentially the same as that presented at petitioner's trial for automobile tampering. Officer O'Toole also testified and his testimony was also essentially the same as that given during the earlier trial albeit less detailed in some respects. (Id., at 39-44.) Finally, officer Jack Schneedle of the Kirkwood, Missouri Police Department testified about the photographic display he presented, after petitioner's arrest for automobile tampering, to the automobile dealership personnel. Petitioner was identified as the suspected automobile thief. (Id., at 44-54.) Officer Schneedle also testified as to the distances between the automobile dealership and the general area of St. Mary's Honor Center (where petitioner resided). (Id.)

Finally, petitioner testified at his second trial. (Id., at 124-142.) He

stated that he never visited the dealership on the date in question and that, in fact, he had left his school assignment that date and returned directly to the Honor Center, arriving there before he allegedly departed from the automobile dealership. (Id.) The defense attempted to buttress petitioner's testimony with the testimony of Lewis Baring, chief of custody at St. Mary's Honor Center, and Eldon Gravett, a former correctional officer at the Center. (Id., at 64-123.) These witnesses explained the Center's procedures for accounting for each inmate throughout the Center's daily routine and explained the Center's records on petitioner's whereabouts for November 22, 1985 between the hours of 9:00 a.m. and 10:00 p.m. (Id.)

The jury at this trial was given the following instruction (among others) to guide its deliberations:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 22, 1985, in the County of St. Louis, State of Missouri, the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and

Second, that defendant did so without the consent of Kirkwood Mitsubishi, and

Third, that defendant did so for the purpose of withholding it from the owner permanently, and

Fourth, that the property taken was an automobile,

then you will find the defendant guilty of felony stealing.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty of felony stealing, you will return a verdict finding him guilty of felony stealing.

[Resp. Exh. B, at 28.) The jury returned a verdict of guilty in accordance with this instruction. (Id., at 33.)

After a review of the record, the undersigned concludes that the evidence adduced at petitioner's first trial (for first-degree tampering) could not have sufficed to support his subsequent conviction for automobile theft. Ragins, supra, 840 F.2d at 1188; see, Tercero, supra, 580 F.2d at 314. Specifically, there was insufficient evidence presented at petitioner's first trial to demonstrate that petitioner was able to be present at the Kirkwood automobile dealership at the approximate time attested to by Naughton and George and to return to St. Mary's Honor Center in time to be counted as present in the Center's records by the evening "count." The travel time testimony of Officer Schneedle is critical in this regard. Indeed, the St.

Louis County trial court recognized that whether petitioner was present at the automobile dealership on November 22, 1985, at approximately 4:00 p.m., was a critical issue at petitioner's trial for auto theft (unlike his earlier trial for tampering.) The court gave the following instruction:

> One of the issues in this case is whether the defendant was present at 1040 North Kirkwood Road, in the City of Kirkwood, in the County of St. Louis, State of Missouri, on November 22, 1985, at approximately 4:00 p.m. On that issue you are instructed as follows:
>
> 1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.
>
> 2. If the evidence in this case leaves in your mind a reasonable doubt that the defendant was present at 1040 North Kirkwood Road, in the City of Kirkwood, in the County of St. Louis, State of Missouri, on November 22, 1985, at approximately 4:00 p.m., then

> you must find the defendant not guilty.

(Resp. Exh. B, at 30.) The testimony of Officer Schneedle regarding the time required to travel from the Kirkwood automobile dealership to the general area of St. Mary's Honor Center provided the jury a reasonable basis on which to find that defendant was present at the automobile dealership at approximately 4:00 p.m. on November 22, 1985, as Naughton and George alleged. Furthermore, the testimony of Baring and Gravett further detailed the procedures at St. Mary's Honor Center in accounting for inmates. From this evidence, a jury could reasonably find that petitioner did indeed visit the dealership and return to the Center in time to be counted "present" at the next "count" of inmates.

The foundation of petitioner's double jeopardy is his claim that the same

evidence was used to convict him in his trial for automobile theft as was used in his earlier trial for automobile tampering. As noted, some of the evidence was presented at both trials. It appears to the undersigned that this "overlapping" was the result of the prosecution's attempt in the first trial to demonstrate that petitioner had knowledge that the automobile in which petitioner was apprehended was stolen. Petitioner then presented evidence of his whereabouts at the time and date of his alleged visit to the automobile dealership to rebut the prosecution's evidence of the "knowingly" element of the automobile tampering charge. However, despite this use of some evidence at both trials, the undersigned concludes that the evidence submitted at petitioner's trial for automobile tampering was legally insufficient to convict him of automobile theft. In

sum, the undersigned concludes that petitioner's motion to alter or amend the Court's judgment should be denied.

## RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the motion of Terry D. McIntyre to alter or amend the judgment previously entered in this cause be denied. The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation.

--David D. Noce---------
UNITED STATES MAGISTRATE

Signed this 7th day of August, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| TERRY D. McINTYRE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri, | ) | |
| | ) | |
| Respondents. | ) | |

ORDER

This matter is before the Court on the petitioner's motion to alter or amend judgment. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Petitioner has objected thereto.

After careful consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that petitioner's motion to alter or amend the judgment previously entered in this cause is DENIED.

Dated this 18th day of September, 1989.

--Edward L. Filippine---
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| TERRY D. McINTYRE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri, | ) | |
| | ) | |
| Respondents. | ) | |

**MEMORANDUM AND ORDER**

This matter is before the Court on petitioner's motion for a certificate of probable cause and request to proceed in forma pauperis on appeal.

By order dated November 22, 1988, this Court dismissed the petition of Terry D. McIntyre for writ of habeas corpus. And, by order dated September 18, 1989, this Court denied petitioner's motion to alter or amend the order of November 22, 1988.

In order to obtain a certificate of probable cause petitioner "'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further.'" Gordon v. Willis, 516 F.Supp. 911, 913 (N.D.Ga. 1980) (quoting United States ex rel. Jones v. Richmond, 245 F.2d 234 (2d Cir.), cert. denied, 355 U.S. 846 (1957)." Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983). After reviewing petitioner's writ of habeas corpus and his motion to alter or amend the Court concludes that reasonable jurists could not differ on the conclusion that the evidence submitted at petitioner's trial in the Circuit Court of the City of St. Louis for automobile tampering was insufficient to convict him of automobile theft and thus the trial in

the Circuit Court of St. Louis County for stealing a motor vehicle was not double jeopardy. Accordingly, the Court will deny petitioner's motion for a certificate of probable cause.

Because it appears that petitioner is indigent, however, the Court will grant petitioner's motion to proceed on appeal in forma pauperis.

Accordingly,

IT IS HEREBY ORDERED that petitioner's motion for a certificate of probable cause is DENIED.

IT IS FURTHER ORDERED that petitioner's request to proceed in forma pauperis on appeal is GRANTED.

Dated this 17th day of October, 1989.

--Edward L. Filippine---
UNITED STATES DISTRICT JUDGE

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

No. 89-2700EM

| | | |
|---|---|---|
| Terry D. McIntyre, | ) | |
| | ) | |
| Appellant, | ) | Appeal from the |
| | ) | United States |
| v. | ) | District Court for |
| | ) | the Eastern |
| Myrna Trickey, | ) | District of |
| | ) | Missouri |
| Appellee. | ) | |

This appeal from the United States District Court for the Eastern District of Missouri comes before the Court on consideration of an application for certificate of probable cause to appeal. In connection with the application, the Court has carefully examined the file of the District Court in case number 88-1708 C(2). Being fully advised in the premises, it is ordered by the Court that the application for certificate of probable cause be granted.

It is further ordered that the Clerk of this Court is directed to appoint John

Davidson of St. Louis, Missouri, to represent the appellant herein under the terms of the Criminal Justice Act.

May 7, 1990

Order entered at the direction of the Court

--Robert D. St.Vrain--

Clerk, U.S. Court of Appeals, 8th Circuit.

**STATE of Missouri, Respondent,**

**v.**

**Terry D. McINTYRE, Appellant.**

**No. 51914.**

Missouri Court of Appeals,
Eastern District,
Division One.

June 30, 1987.

SATZ, Presiding Judge.

Defendant Terry D. McIntyre was convicted by a jury of tampering in the first degree, § 569.080, RSMo. 1986, and was sentenced as a persistent offender to ten years imprisonment. Defendant appeals. We affirm.

On November 22, 1985, defendant went to Kirkwood Mitsubishi and asked to test drive a Mitsubishi Galant. Defendant was left alone in the showroom for approximately two minutes while the salesman went to get the keys to the Galant. During this time, defendant was looking

at the interior of a car on the showroom floor. This car had its keys in its ignition, and those keys were similar to the keys to the Galant.

After defendant test drove the Galant, he gave the salesman a set of Mitsubishi keys. The salesman placed the keys on a board where they were normally kept. Shortly thereafter, the salesman discovered the Galant was missing and also discovered the keys on the board were to the showroom car defendant had been looking at, not the Galant. The salesman reported the missing Galant to the Kirkwood police.

Two days later, police saw defendant driving the Galant, which was listed on a "hot sheet" of stolen cars. After chasing the car for approximately eight blocks, police stopped the car and arrested defendant. Defendant testified at

trial he had borrowed the car from a friend.

Defendant makes two arguments on appeal. Neither has merit. First, defendant argues it was error to allow the introduction of evidence showing defendant may have stolen the Galant. Defendant argues the prejudicial effect of this evidence outweighed its probative value. We disagree.

Generally, evidence of other crimes is inadmissible unless it has some legitimate tendency to establish defendant is guilty of the crime charged. *State v. Shaw*, 636 S.W.2d 667, 672 (Mo. banc 1982). Thus, this evidence may be admissible when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity. *State v. Trimble*, 638 S.W.2d 726, 732 (Mo. banc 1982); *State v. Caldwell*, 695 S.W.2d 484, 486 (Mo.App.1985).

As an element of its case, the State was required to prove defendant knew he was operating the car without the consent of the owner. The evidence linking defendant with the theft of the car tended to establish this knowledge on the part of defendant and thus was relevant. *See, e.g. State v. Remspecher*, 542 S.W.2d 24, 25 (Mo.App.1976). The key question is whether the relevancy of this evidence is outweighed by its possible prejudicial effect. *Caldwell, supra* at 484. The decision whether the potentially prejudicial effect of evidence outweighs its probative value is within the sound discretion of the trial court. *Shaw, supra* at 672. The trial court here properly exercised its discretion in admitting the evidence.

Defendant also argues the trial court erred in rejecting his proffered instruction on the use of prior

convictions to impeach his testimony. The 3.00 series of MAI-CR2d has two instructions relating to the use of prior convictions for impeachment: 3.56 entitled "Impeachment of a Witness Other Than Defendant by Prior Offenses" and 3.58 entitled "Impeachment of Defendant by Conviction of 'Unrelated Crimes' Shown Solely for the Purpose of Impeachment". Defendant requested the trial court use MAI-CR2d 3.56 to instruct the jury on the prosecutor's use of prior convictions to impeach defendant's testimony. The trial court properly refused to do so.

The proper instruction to be given when the defendant's testimony has been impeached with prior convictions is MAI-CR2d 3.58. MAI-CR2d 3.58 Notes on Use, note g; *State v. Williams*, 632 S.W.2d 266 (Mo.App.1982). Whenever there is an MAI-CR instruction applicable under the law to the facts, the MAI-CR instruction

must be given to the exclusion of any other on the same subject. Rule 28.02(c); *State v. Morris*, 639 S.W.2d 239, 240-241 (Mo.App.1982). Defendant argues he would be prejudiced by the use of MAI-CR2d 3.58 over MAI-CR2d 3.56, because MAI-CR2d 3.58 explicitly lists the prior offenses used to impeach. This argument has been made and rejected. *Williams, supra* at 266. If the prior convictions have already been elicited on cross-examination, we do not see how defendant can be prejudiced by a reference to them in an instruction.

Moreover, instructions in the 3.00 series of MAI-CR2d are required to be given only if requested. Rule 28.02(a). Defendant did not request instruction MAI-CR2d 3.58. According to the prosecutor's statement on the record, the trial court offered to give MAI-CR2d 3.58 and the defendant refused this offer. The

trial court agreed with the prosecutor's characterization of the events at the instruction conference. If defendant refused MAI-CR2d 3.58, the trial court was under no obligation to substitute an alternative instruction. *Williams, supra* at 266. *See also Morris, supra* at 241.

Judgment affirmed.

CRIST and KELLY, JJ., concur.

**STATE of Missouri,**
**Plaintiff-Respondent,**

**v.**

**Terry D. McINTYRE,**
**Defendant-Appellant.**

**No. 53084.**

Missouri Court of Appeals,
Eastern District,
Division One.

Feb. 16, 1988.

REINHARD, Judge.

Defendant was found guilty by a jury of stealing a motor vehicle and sentenced by the court as a persistent offender to a term of 10 years' imprisonment to be served consecutively to an existing 10-year sentence. He appeals; we affirm.

On November 22, 1985, a man who identified himself as "Johnny" went to Kirkwood Mitsubishi and told salesman Steven George he wanted to test drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a

Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the keys to the demonstrator Galant.

After a test drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About 15 minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys on the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis city police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show

to automobile salesman George. Two of the photos, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George, and asked him if any of the photos were of the person who was in the dealership and took a ride in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first degree tampering for operating the Galant in the city of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to 10 years' imprisonment.

We affirmed his tampering conviction on appeal. *State v. McIntyre*, 735 S.W.2d 111 (Mo.App.1987).

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also identified defendant in court as "Johnny," the person who test drove the Galant that later was stolen. Defendant also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the date of the

theft, defendant approached the general manager in the dealership building and inquired about a Mitusbishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

On appeal, defendant contends the trial court erred in failing to sustain his motion to dismiss "on grounds of prior jeopardy in that [defendant] had already been previously tried and convicted of unlawfully operating the vehicle he was charged in this case with stealing."

Defendant relies primarily on *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). We believe *Brown* supports the result we have reached. In *Brown*, the defendant was arrested on December 8, 1973, while driving a stolen car. He was charged with "joyriding," pled guilty, and served a 30-day jail

sentence. After his release from jail, he was charged with the November 29, 1973, theft of the automobile. The trial court overruled his double jeopardy objection and the Ohio Court of Appeals affirmed. In its opinion, the Ohio appellate court stated its conclusion that, under Ohio law, the misdemeanor of joyriding was included in the felony of auto theft; however, it held the second prosecution permissible because the theft occurred on November 29 and the joyriding on December 8. *Brown*, 432 U.S. at 162-64, 97 S.Ct. at 2223-24, 53 L.Ed.2d at 192-93. Relying on the Ohio Court of Appeals's interpretation of the Ohio statutes, the United States Supreme Court reversed the conviction on double jeopardy grounds. *Id*. at 168-70, 97 S.Ct. at 2226-27, 53 L.Ed.2d at 195-97.

Here, defendant asks us to overrule a long line of Missouri opinions that

hold that tampering with a motor vehicle is not a lesser included offense of stealing the same vehicle. In his brief, defendant states as follows:

> The Ohio Court of Appeals had earlier held that the crime of joyriding was included in the offense of auto theft. Missouri courts have developed a different interpretation, holding that joyriding or "tampering" is *not* a lesser included offense of auto theft. This is contrary to the definitions of the respective offenses and the meaning of "lesser included offense."
>
> ....
>
> The statutes involved in the *Brown* case are virtually identical to the Missouri Statutes for tampering and stealing a motor vehicle. (Citations omitted.)

We recognize that our courts have interpreted the Missouri stealing and tampering statutes differently from the Ohio court's interpretation of Ohio law. In *Brown*, however, the United States Supreme Court recognizes that state

courts "have the final authority to interpret . . . that State's legislation," and the Court's ruling was based on the Ohio court's determination that, under Ohio law, joyriding is a lesser included offense of auto theft. The Missouri Court of Appeals, Western District, faced this issue in *State v. Smith*, 655 S.W.2d 626 (Mo.App.1983), and concluded that auto tampering is not a lesser included offense of auto theft. We have consistently followed the western district's view.[1] *Smith* and our opinions that follow it were published subsequent to *Brown*, and we see no reason to deviate from this precedent.

---

[1] *See State v. Rivers*, 663 S.W.2d 255 (Mo.App.1983); *State v. Gobble*, 675 S.W.2d 944 (Mo.App.1984); *State v. Souders*, 703 S.W.2d 909 (Mo.App.1985). Our supreme court denied applications to transfer in *Smith*, *Rivers*, and *Gobble*.

We recognize, as did Justice Blackmun in his dissenting opinion in *Brown*, that the appropriation and operation of an automobile could be "so closely connected in time" that they would constitute only one offense. *Brown*, 432 U.S. at 171, 97 S.Ct. at 2228, 53 L.Ed.2d at 198. Here, however, the tampering was not a part of the stealing that occurred two days earlier. Had defendant been charged with stealing and tampering based solely on his driving the Galant from the dealership parking lot, then we believe his conduct would constitute only one offense.[2]

---

[2]We note that defendant, at his trial on the tampering charge, objected to evidence that he stole the Galant, seeking to exclude it as evidence of another crime. In ruling on this complaint, we treated the stealing as a separate offense from the tampering. *McIntyre*, 735 S.W.2d at 112.

Defendant also alleges the trial court erred in failing to sustain his motion to suppress identification of his photograph by automobile salesman George and George's in-court identification. He argues that, because none of the four other photographs showed a man with a similar hair style, the circumstances were "inherently suggestive and conducive to mistaken identification."

We have carefully reviewed the record and concluded that, based on the totality of the circumstances, Detective Schneedle was not impermissibly suggestive in his conduct of the photo identification session with George. *See State v. Higgins*, 592 S.W.2d 151, 159-60 (Mo. banc 1979), *appeal dismissed*, 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254 (1980). Moreover, George's in-court identification of defendant was reliable under the totality of the circumstances

test of *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *See Higgins*, 592 S.W.2d at 160.

Judgment affirmed.

GARY R. GAERTNER, P.J., and CRIST, J., concur.

**United States Court of Appeals**

**FOR THE EIGHTH CIRCUIT**

No. 89-2700EMSL

| | | |
|---|---|---|
| Terry D. McIntyre, | * | |
| | * | |
| Appellant, | * | Order Denying |
| | * | Petition for |
| v. | * | Rehearing and |
| | * | Suggestion for |
| Myrna Trickey, | * | Rehearing En Banc |
| | * | |
| Appellee. | * | |

The suggestion for rehearing en banc is denied. Judge Fagg and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

December 10, 1992

Order Entered at the Direction of the Court:

--Michael E. Gans--

Clerk, U.S. Court of Appeals, Eighth Circuit

PETITION UNDER 28 USC § 2254
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
_____ DIVISION

Name: Terry McIntyre Prisoner No. 44126
Case No. 88-1708-C-2

Place of Confinement: Missouri Eastern
Correctional Center

Name of Petitioner Name of Respondent
Terry D. McIntyre v. Myrna Trickey

The Attorney General of the State of:
Missouri William Webster

PETITION

1. Name the location of court which entered the judgment of conviction under attack: St. Louis City Circuit Court, St. Louis County Circuit Court.

2. Date of judgment of conviction: June 5, 1986, May 1987.

3. Length of sentence: Consecutive Sentences of 10 years and 10 years.

---

[1]Respondent filed his petition on a model form. Questions from the form are in ordinary type. Respondent's answers and the unanswered questions on the form are shown with an underline.

4. Nature of offense involved (all counts): St. Louis city, Tampering First Degree, St. Louis County, Stealing an Auto, both convictions resulting from the same offense.

5. What was your plea? (Check one)

(a) Not guilty [X]
(b) Guilty [_]
(c) Nolo Contendere [_]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have: (Check one)

(a) Jury [X]
(b) Judge only [_]

7. Did you testify at the trial?

Yes [X] No. [_]

8. Did you appeal from the judgment of conviction?

Yes [X] No. [_]

9. If you did appeal, answer the following:

(a) Name of court: Missouri Court of Appeals, Eastern District.
(b) Result: Affirmed.
(c) Date of result: Feb. 16,1988, 744 S.W.2d 894, (Mo. app.1988)
(d) Grounds raised: Double Jeopardy
(e) If you sought further review of

the decision on appeal by a higher state court, please answer the following:

(1) Name of court: Missouri Supreme Court.
(2) Result: Application to Transfer, Denied.
(3) Date of result and citation, if known: May 17,1988
(4) Grounds raised: Double Jeopardy

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: Not Applied
(2) Result: _____
(3) Date of result and citation, if known: _____
(4) Grounds raised: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment in any court, state or federal?

Yes [X] No. [_]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: St. Louis County Circuit Court
(2) Nature of proceeding: 29.15 Motion, Post-Conviction Relief

(3) Grounds raised: Ineffective Assistance of Counsel
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]
(5) Result: Pending Disposition
(6) Date of result: _____

(b) As to any second petition, application or motion[,] give the same information:

(1) Name of court: _____
(2) Nature of proceeding:
_____
(3) Grounds raised: _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]
(5) Result: _____
(6) Date of result: _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.
Yes [_] No. [_]
(2) Second petition, etc.
Yes [_] No. [_]

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____
_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to his conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully

induced or not made voluntarily with understanding of the nature of the chart and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SEE ATTCHED

Supporting FACTS (tell your story *briefly* without citing cases or law): SEE ATTCHD

Attached Information to A, Ground One.

A. Ground One. The State of Missouri violated petitioners rights under the

double jeopardy clause, of the 5th Amendment, in that: The evidence used by the State of Missouri in prosecuting the first offense, Tampering First Degree, was also used to sustain a conviction in the second offense, Stealing a Motor Vehicle, in violation of Brown vs.O hio, 432 U.S. 161, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977).

The principle question in this case is whether Auto Theft and Tampering First Degree, constitute the"SameO ffense" under the Double Jeopardy Clause. In Re Nielsen,131 U S '176, 9 S. Ct. 672, 33 L.Ed.118 (1889).

Supporting Facts: On December 19,1985, petitioner was charged with first degree tampering for operating a stolen motor vehicle; and he was subsequently found guilty by a jury on June 5,1986. Thereafter, on August 9, 1986, petitioner was again charged with stealing the same motor vehicle based on his alleged appropriation of it from the dealership. The evidence relied on by the State to convict petitioner at his first trail for first degree tampering was the exact same evidence - relied on by the State to convict petitioner at his subsequent trail for stealing the same motor vehicle. The State also used the same - witnesses at the first and second trail. It is without question that the evidence required to warrant a conviction upon petitioner's first - prosecution would have been sufficient to support his conviction upon the subsequent prosecution for stealing the same motor vehicle that he had earlier been convicted of for first degree tampering for operating the same motor vehicle.

Petitioner maintains that the City of St. Louis and St. Louis County prosecutions must be viewed as the acts of a single sovereign under the double jeopardy clause.

Conclusion: For This reason, the Court should grant the petition for writ of Habeas Corpus to establish and clarify the standards by which the Missouri Courts interpret a clear violation of the fifth(5th) and fourteenth (14th) Amendments to the United States Constitution.

Respectfully,

--Terry D. McIntyre--
Terry McIntyre Petitioner

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law): ____
_____

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law): ____
_____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law): ____
_____

13. If any of the ground listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting

them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes [X] No. [_]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Mr. Paul Madison, No. 35261, St. Louis County Public Defenders Office.

(b) At arraignment and plea: _____

(c) At trial: Same

(d) At sentencing: Same

(e) On appeal: Same

(f) In any post-conviction proceeding: _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [_] No. [X]

17. Do you have any future sentence to

serve after you complete the sentence imposed by the judgment under attack?

Yes [_] No. [X]

(a) If so, give name and location of court which imposed sentence to be served in the future: ___

_____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [_] No. [_]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in his proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 8/5/88
(date)

--Terry D. McIntyre--
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| TERRY D. McINTYRE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 88-1708C(2) |
| | ) | |
| MYRNA TRICKEY, | ) | |
| | ) | |
| Respondent. | ) | |

MOTION TO ALTER OR AMEND JUDGMENT

Comes now petitioner, Terry D. McIntyre, pro se, and pursuant to Fed.R.Civ. P. 59(e), and would respectfully move the Court to alter or amend its judgment entered in the above-entitled cause and for his cause of action states as follows:

1. That, on November 22, 1988, the Court sustained and adopted the Report and Recommendation of the United States Magistrate and dismissed petitioner's petition for a writ of habeas corpus in the above-entitled cause.

2. That this pro se motion to alter or amend the Court's judgment in the above-entitled cause is served not later than 10 days after entry of the judgment and is timely filed.

3. That the petitioner would respectfully reiterate to the Court that the findings of the United States Magistrate, which the court has sustained and adopted, having totally, either through inadvertence or oversight, misconstrued petitioner's double jeopardy argument advanced in his petition for a writ of habeas corpus.

4. The U.S. Magistrate stated that the "/p/etitioner contends that the tampering and stealing a motor vehicle offense constitute the same offense." (U.S. Magistrate's Report and Recommendation, p. 2) (emphasis added). The Magistrate went on to conclude that "/u/nder Missouri law, tampering with a motor

vehicle is not a lesser-included offense of stealing the same vehicle." Id. at 3. In addition to these findings, the U.S. Magistrate noted that "the Missouri Court of Appeals found that 'the tampering was not a part of the stealing that had occurred two days earlier' for which petitioner was subsequently convicted and sentenced in the Circuit Court of the City of St. Louis." Ibid.

5. These findings by the U.S. Magistrate totally overlook that it is not a question as to whether the tampering and stealing a motor vehicle offense constitute the "same offense" under Missouri law, but whether these offense constitute the "same offense" for double jeopardy purposes is the question to be answered. Cf. Jordan v. Com. of Va., 653 F.2d 870 (4th Cir. 1980). In the instant case, as was the case in Jordan, the evidence necessarily used by the State in

prosecuting the earlier first-degree tampering charge would totally have sufficed to sustain the later stealing a motor vehicle charge. Thus, the evidence required to warrant a conviction upon the first-degree tampering charge would have been sufficient to support a conviction upon the stealing a motor vehicle charge. Therefore, under the standard enunciated by the United States Supreme Court in In re Nielsen, 131 U.S. 176, 188, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the second prosecution was barred because the "same evidence" would have sufficed to gain a conviction on either charge.

6. Petitioner would respectfully submit to the Court that the "actual-evidence" test employed and relied on in In re Nielsen, supra, rather than the "same offense" test employed in Brown v. Ohio, 432 U.S. 161 (1977) and relied on by the U.S. Magistrate and this Court, should

have been used to decide petitioner's double jeopardy claim in the instant case. See also Illinois v. Vitale, 447 U.S. 410, 419-21, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980).

7. In the instant case, the Court should examine the actual evidence presented at both of petitioner's trials in the State courts. Had the Court examined petitioner's double jeopardy claim in this posture, under In re Nielsen, supra, the Court's conclusion may have been different.

WHEREFORE, for the reasons so stated herein, petitioner prays that the Court alter or amend its judgment entered in the above-entitled cause and grant such other and further relief it deems just and proper in the premises.

Dated this 30th day of November, 1988.

Respectfully submitted,

--Terry D. McIntyre---
Terry D. McIntyre
Reg. No. 44126
MECC, 11B-16
18701 Old Highway 66
Pacific, Mo 63069

pro se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed postage prepaid, this 30th day of Nov., 1988, to:

Stephen D. Hawke
Asst. Attorney General
P. O. Box 899
Jefferson City, MO 65102

--Terry D. McIntyre--
TERRY D. McINTYRE

No. 92-___

92-1465

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

92-1465

Supreme Court, U.S.
FILED
SEP 14 1993
OFFICE OF THE CLERK

ORIGINAL

PAUL CASPARI and JEREMIAH NIXON,

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

**RESPONDENT'S MOTION FOR LEAVE TO FILE IN FORMA PAUPERIS**

Respondent Terry McIntyre, by and through his appointed attorney Dorothy D. Danforth, asks leave to file the attached Response to Petition for Writ of Certiorari, without prepayment of costs and to proceed *in forma pauperis.* Respondent has been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. No affidavit is attached, inasmuch as the U.S. Court of Appeals for the Eighth Circuit appointed counsel for respondent under the Criminal Justice Act of 1964.

Respectfully submitted,

Dorothy D. Danforth

DOROTHY D. DANFORTH
11 S. Meramec, Suite 1330
St. Louis, Missouri 63105
(314) 721-6677
ATTORNEY FOR RESPONDENT

## CERTIFICATE OF SERVICE

Dorothy D. Danforth hereby certifies that she has caused a true copy of the Respondent's Motion for Leave to File in Forma Pauperis to be served upon the Attorney General for the State of Missouri, Post Office Box 899, 221 W. High Street, Jefferson City, Missouri, 65102, via first class mail.

Dated September 14, 1993.

Dorothy D. Danforth

DOROTHY D. DANFORTH

No. 92-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
SEP 14 1993
OFFICE OF THE CLERK

PAUL CASPARI

and

JEREMIAH W. NIXON,

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DOROTHY D. DANFORTH
11 South Meramec, Suite 1330
St. Louis, Missouri 63105
(314) 721-6677

*Attorney for Respondent*

## QUESTIONS PRESENTED

I.

WHETHER THE QUESTIONS PRESENTED BY THE PETITIONERS ARE NON-JUSTICIABLE ISSUES BECAUSE THEY ADDRESS MATTERS PERTINENT ONLY TO GRADY V. CORBIN WHICH HAS BEEN OVERRULED BY THIS COURT.

II.

WHETHER REGARDLESS OF THE FACT THAT GRADY V. CORBIN HAS BEEN OVERRULED, RESPONDENT STILL PREVAILS ON HIS CLAIM OF DOUBLE JEOPARDY.

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II. WHETHER REGARDLESS OF THE FACT THAT GRADY V. CORBIN HAS BEEN OVERRULED, RESPONDENT STILL PREVAILS ON HIS CLAIM OF DOUBLE JEOPARDY... 5

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Respondent Terry McIntyre respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

## STATEMENT OF THE CASE

On November 22, 1985 respondent Terry McIntyre took into his possession an automobile which was owned by a car dealership in St. Louis County, Missouri. Two days later, on November 24, 1985, respondent was arrested in the county of St. Louis City which is adjacent to St. Louis County. In June of 1986 in St. Louis City respondent was prosecuted, tried and found guilty of the offense of Tampering in the First Degree[1]. Respondent was sentenced on July 11, 1986 as a prior and persistent offender to serve a term of ten years.

On August 9, 1986 respondent was charged in St. Louis County with having committed the offense of Stealing[2]. Respondent's motion to dismiss the stealing charge on double jeopardy grounds was denied and in February of 1987 respondent was found guilty and was sentenced to a term of ten years to run consecutively to the sentence imposed on him previously for tampering.

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[1] Section 569.080, RSMo 1986 Tampering in the first degree provides that: 1. A person commits the crime of tampering in the first degree if: (2) He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile... without the consent of the owner thereof.

[2] Section 570.030, RSMo 1986 Stealing-penalties states: 1. A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

Respondent's conviction was affirmed by the Missouri Court of Appeals, State v. McIntyre, 7459 S.W.2d 111 (Mo. Ct. App. 1988). Respondent filed a petition for writ of habeas corpus on September 2, 1988 in the United States District Court for the Eastern District of Missouri. The District Court denied McIntyre's petition for writ of habeas corpus on October 17, 1989. The United States Court of Appeals for the Eighth Circuit granted the writ of habeas corpus on July 15, 1991. Rehearing was denied on September 4, 1991. The State of Missouri filed a Petition for Writ of Certiorari and respondent filed his response. This Court remanded the case to the Eighth Circuit for reconsideration in light of United States v. Felix, _____U.S.__, 112 S.Ct. 1377 (1992). On reconsideration, the Eighth Circuit affirmed its previous decision. The State of Missouri again Petitions this Court for a Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

The issues raised by the petitioners in their questions presented deal only with the retroactive application of Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) and with the manner of interpreting Grady in connection with the federal rules of evidence. These questions are inappropriately before this Court as Grady v. Corbin has been overruled. For the reason that Grady has been overruled, the petition for a writ of certiorari should be denied.

Although Grady v. Corbin has been overruled respondent's claim of double jeopardy continues to prevail. Under the same-

elements test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 respondent's subsequent prosecution for stealing violates the double jeopardy clause. Because the same double jeopardy issue has been addressed on numerous occasions by this Court, even as recently as June of 1993 in United States v. Dixon, _____U.S.__, 113 S.Ct. 2849 (1993), and because the issues are virtually identical to those addressed by this Court in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) this case is not worthy of a grant of certiorari.

I.

**Whether the questions presented by the petitioners are non-justiciable issues because they address matters pertinent only to Grady v. Corbin which has been overruled by this Court.**

The petitioners' first question presented inquires whether the rule of Grady v. Corbin, 495 U.S. 508 (1990), can be applied retroactively to a habeas corpus petitioner because the Double Jeopardy Clause's bar to a successive prosecution is a categorical guarantee of the Constitution. This Court need not consider this question presented by the petitioner because it is moot as a matter of law.

This Court has recently overruled Grady v. Corbin in United States v. Dixon, _U.S.__, 113 S.Ct. 2849 (1993) and the question raised by the petitioners concerning the retroactive application of Grady is therefore an inappropriate subject for this Court to consider.

In their first point, the petitioners focus solely on the retroactivity of Grady v. Corbin and the bulk of the petitioners' argument concerns the reading of the first exception to the retroactivity rule set forth in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and the question of whether Grady v. Corbin created "new law". Petitioners argue that a division among the Circuits regarding this issue makes the issue worthy of this Court's consideration. The issue is a non-issue and is not worthy of this Court's grant of certiorari. There can be no dispute between the Circuits concerning the manner in which an overruled case is to be read.

The petitioners second question presented asks whether the double jeopardy clause, as interpreted in Grady v. Corbin, 495 U.S 508 (1990), (1) prohibits the introduction at trial of "evidence of other crime" where that crime has already been prosecuted or (2) prohibits the prosecution of a crime where evidence of that crime was adduced at an earlier trial as "evidence of other crime." Because of the fact that Grady v. Corbin was overruled by United States v. Dixon, this question presented is also a moot issue and as such in nonjusticiable.

The State's second argument addresses the evidentiary questions which were raised in United States v. Felix, ___ U.S. __, 112 S.Ct. 1377 (1992) and which were the first indication by this Court that Grady v. Corbin posed unforeseen problems in prosecutions. Inasmuch as the State's argument addresses only the question concerning the issues of "evidence of other crimes" and Rule 404(b)

of the Federal Rules of Evidence in the context of a Grady v. Corbin analysis it is moot. This Court should not grant a writ of certiorari to a Petitioner whose questions presented have become nonjusticiable since the time the Petition was filed with this Court.

No supplemental brief has been filed by the State thus far addressing the fact that Grady v. Corbin has been overruled by the recently decided case United States v. Dixon, _ U.S._, 113 S.Ct. 2849. The petitioners have not suggested that Grady should be overruled nor have they suggested that the case is an incorrect interpretation of the application of the double jeopardy clause, rather, the arguments raised by the petitioners concern narrow issues of retroactivity and the rules of evidence as applied in Grady. Rule 14.1(a) of the Rules of the Supreme Court of the United States provides that: "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." The questions set forth in the petition do not warrant review by this Court on the basis of the fact that they are moot and the Court need not address any questions not raised by the Petitioners.

## II.

**Whether regardless of the fact that Grady v. Corbin has been overruled, respondent still prevails on his claim of double jeopardy.**

Certiorari should not be granted in this case because, regardless of the fact that Grady v. Corbin was overruled, there is no impact on the determination of the Eighth Circuit that respondent McIntyre's

stealing conviction violated his Fifth Amendment right which guarantees that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause was incorporated to apply to the states through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Respondent prevails on his double jeopardy claim under the newly decided United States v. Dixon which restores the double jeopardy analysis to its pre-Grady state. Respondent prevails under the "same-elements" test which was established in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) and which has been reiterated in numerous decisions of this Court. As summarized in Dixon, 113 S.Ct. at 2856 "[t]he same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) provides respondent with the analysis of the double jeopardy clause which most clearly elucidates the double jeopardy question which arose in respondent's case. In Brown the criminal defendant was prosecuted first for joyriding[3] under the laws of the state of Ohio and after his conviction was later prosecuted for stealing[4] the same vehicle. This

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[3] The Ohio statute prohibiting joyriding provided that: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner."

[4] The Ohio stealing statute provided: "No person shall steal any motor vehicle"

Court held that the subsequent prosecution for stealing violated the double jeopardy clause of the Fifth Amendment. The opinion stated that the offenses were the same for purposes of the double jeopardy clause in that all of the elements of one of the offenses, the joyriding offense, would be required to be proved in order for the defendant to be convicted of stealing. The Blockburger test was employed in reaching this conclusion.

The Brown v. Ohio decision focused on the fact that joyriding had been determined to be a lesser included offense of stealing by the Ohio Court of Appeals. Because joyriding was deemed a lesser included offense of stealing it would necessarily be subsumed by the offense of stealing. This Court further held that "the sequence [in which the two cases are prosecuted] is immaterial" Brown 97 S.Ct at 2227 and in response to the Ohio Court of Appeals determination that because two different days were involved that there was no double jeopardy this Court stated, "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id

Under the Missouri tampering in the first degree statute no proof beyond that required for conviction of stealing is required. Each element required in tampering in the first degree must be proven in order for a defendant to be convicted of stealing. The elements in tampering in the first degree are: that a person knowingly possess an automobile without the consent of the owner. The elements in stealing are: that a person appropriate property of

another with the intent to deprive him thereof without his consent. The word "appropriate" is defined in section 570.010(3) RSMo to mean "to take, obtain use, transfer, conceal or retain possession of." Stealing requires all of the elements required in tampering in the first degree with the additional element of the intent to deprive and to prosecute a defendant under both statutes is to violate the double jeopardy clause.

Citing a number of previously decided cases, the Missouri Court of Appeals determined that McIntyre could be prosecuted for stealing after his tampering conviction because tampering is not a lesser included offense of auto theft. The cases cited by the Missouri Court of Appeals considered whether the crime of tampering in the second degree was a lesser included offense of auto theft. Those decisions analyzed the elements of the two crimes (tampering in the second degree and stealing) and found that each offense required proof of an element that the other did not. The Missouri Court of Appeals in State v. McIntyre, 749 S.W.2d 420 (Mo.App., E.D. 1988) failed to mention the fact that McIntyre was prosecuted for tampering in the first degree not tampering in the second degree. The elements of tampering in the first degree do not include an element that is not also an element of stealing.

The Missouri Court of Appeals was under the mistaken impression that defendant McIntyre had been charged with and found guilty of tampering in the second degree. Had he been charged with tampering in the second degree respondent concedes that he would not have a viable double jeopardy claim under the

Blockburger test nor could he successfully argue, under Missouri case law, that the crime for which he was first convicted was a lesser included offense for the crime for which he was subsequently prosecuted. However, because respondent was prosecuted under the tampering in the first degree statute rather than the tampering in the second degree statute his subsequent prosecution for stealing violated the double jeopardy clause.

This Court included the following dicta in a footnote in Brown v. Ohio "We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent. (Citations omitted). We also would have a different case if in sustaining Brown's second conviction the Ohio courts had construed the joyriding statute to have that effect. We then would have to decide whether the state court's construction, applied retroactively in this case, was such 'an unforeseeable judicial enlargement of a criminal statute' as to violate due process." 97 S.Ct. at 2227, fn. 8.

While Respondent is fully aware of the fact that this Court will typically not review a state court's interpretation of state law, Garner v. Louisiana, 368 U.S. 157, 169, 82 S.Ct. 248, 254, 7 L.Ed.2d 207 (1961), it is apparent that in addition to the fact that the Missouri Court of Appeals may have decided McIntyre incorrectly, it also applied its decision that tampering in the first degree was not a lesser included offense of stealing retroactively to defendant McIntyre and in so doing violated the due process clause of the Fourteenth Amendment. The Missouri Courts had not previously

held that tampering in the first degree was not a lesser included offense of stealing and the decision was made applicable to defendant McIntyre retroactively. This is precisely the situation addressed by this Court in Brown v. Ohio in footnote eight.

This Court may review a state court's decision as a matter of determining whether the fundamental guarantee of due process provided to criminal defendants and made applicable to the states under the Fourteenth Amendment was denied. In Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) this Court stated that "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." Id., 378 U.S. at 352, 84 S.Ct. at 1702. Later in the opinion this Court stated, "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. (citing Hall, General Principles of Criminal Law (2d ed. 1960) at 61)." Bouie, 378 U.S. at 354, 84 S.Ct. at 1703. Finally, this Court found that,

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. (Citations omitted). The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive

> the defendant of the fair warning to which the Constitution entitles him... When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' (Citing Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107). Bouie v. City of Columbia, 378 U.S. at 354, 84 S.Ct. at 1703.

The questions presented to this Court by the petitioners are not appropriate issues to be heard by this Court and for that reason no writ of certiorari is warranted. Furthermore, respondent prevails on his double jeopardy claim regardless of the status of Grady v. Corbin as the two offenses for which respondent was prosecuted are in fact one offense under the Blockburger test. This case is not worthy of review by the United States Supreme Court; in fact, if any review is necessary the appropriate arena would be that of the Eighth Circuit.

## CONCLUSION

For all of the foregoing reasons, respondent Terry D. McIntyre respectfully requests this Court to deny a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

DOROTHY D. DANFORTH
11 South Meramec, Suite 1330
St. Louis, Missouri, 63105
(314) 721-6677

*Attorney for Respondent*

## CERTIFICATE OF SERVICE

Dorothy D. Danforth hereby certifies that she has caused a true copy of the Response to Petition for Writ of Certiorari to be served upon the Attorney General for the State of Missouri, Post Office Box 899, 221 W. High Street, Jefferson City, Missouri, 65102, via first class mail.

Dated September 14, 1993.

Dorothy D. Danforth

DOROTHY D. DANFORTH